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Date: November 21, 2005

By: Surge J. Mascari

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

PATENT

Inventors:	Crane, et al.	Docket No.:	49335.0300 (fka 10655.7700)
Serial No.:	09/415,632	Examiner:	Poinvil, Frantzy
Filed:	October 12, 1999	Group Art Unit:	3628
Title:	SYSTEM AND METHOD FOR DIVIDING A REMITTANCE AND DISTRIBUTING A PORTION OF THE FUNDS TO MULTIPLE INVESTMENT PRODUCTS		
		Confirmation No.:	5093

INVENTORS' DECLARATION UNDER 37 C.F.R. § 1.131

Mail Stop Amendment  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, Virginia 22313-1450

Dear Commissioner:

We, the undersigned inventors, declare as follows:

1. This declaration establishes conception of the invention in this application in the United States, at a date prior to November 27, 1996, which is the effective filing date of U.S. Patent No. 6,070,153 issued to Simpson, which was cited in the Final Office Action dated May 19, 2005, coupled with due diligence from prior to said date to the subsequent filing of the application on October 12, 1999.
2. We are the inventors of the subject matter described and claimed in United States Patent Application Serial No. 09/415,632, filed October 12, 1999, entitled SYSTEM AND

METHOD FOR DIVIDING A REMITTANCE AND DISTRIBUTING A PORTION OF THE FUNDS TO MULTIPLE INVESTMENT PRODUCTS, and we originally assigned our rights to the invention to assignee's predecessor, American Express Travel Related Services Company, Inc. ("AMEX").

3. To establish the date of conception of the invention of this application, the attached Willkie Farr & Gallagher Memorandum dated September 14, 1990 ("Willkie Memo") is submitted as evidence and is attached herewith as Exhibit A. From this document, it can clearly be seen that the invention in this application was conceived at least by the date of September 14, 1990, which is a date much earlier than the effective filing date of the cited Simpson reference (i.e., November 27, 1996). The Willkie Memo bears a September 14, 1990 date in the third line of the header information and the Willkie Memo was drafted by Willkie Farr & Gallagher, a large, established law firm with offices throughout the World.
4. The Willkie Memo resulted from a request by AMEX to its law firm to address the legal issues arising under the federal securities laws in connection with offering its cardmembers the opportunity to invest in investment products via an investment broker system through payments on their charge cards via a charge card billing system, utilizing a hierarchy of distribution rules.
5. Applicant never abandoned this invention, and Applicant exercised reasonable diligence from prior to September 14, 1990, to the filing of the above-identified patent application.
6. After receiving the Willkie Memo, we inventors and other AMEX representatives worked continuously from 1990-1999 to develop strategies to reduce the invention to practice and to develop strategies to obtain Securities and Exchange Commission (SEC) approval. The financial services, transaction account and investment industries are heavily regulated industries, so numerous government and SEC approvals are typically required to launch any new product. Significantly, it is necessary for any company in these types of industries to wait for SEC approvals before completely reducing the invention to practice because, depending on the nature of the approval obtained from the SEC, it could have a significant

impact on the requirements, functions or processes utilized for reducing the invention to practice.

7. All of the work set forth herein was directly related to the reduction to practice and the work shows the Applicant's reasonable diligence. Numerous meetings and strategy sessions over many years is very common in the industry to reduce any new invention to practice prior to piloting or testing, particularly when the invention is awaiting regulatory developments, or regulatory evaluation and approvals. Applicant sets forth herein evidence of facts establishing due diligence. Applicant also sets forth evidence below that any inactivity or delay during this time is due to the corporate project planning cycle and the need to wait for regulatory changes or approvals. As such, the entire period during which diligence is required is accounted for by either affirmative acts or acceptable excuses.
8. While Applicant had numerous other documents that further provide evidence and support for the statements set forth herein, unfortunately many of those documents were destroyed during the tragic events of September 11, 2001. The AMEX corporate headquarters is located adjacent to the location of the Twin Towers in New York City. While the AMEX headquarters was not directly hit by the hijacked commercial airplanes, the AMEX corporate headquarters received substantial damage from the falling debris. The AMEX employees were not allowed to re-enter their building for many months after the tragedy, while clean-up crews fixed the damage and disposed of numerous important papers and files. Many of the computer systems were also damaged and electronic files were lost.
9. In 1994, certain of Applicant's employees completed and submitted the "Compliance & Control Profile" set forth in Exhibit B. This Profile shows further reduction to practice of the invention because AMEX requires its employees to complete this Profile in order to set up a meeting with the AMEX Business Architect Group responsible for implementing a program to test and commercialize the subject matter of the invention. The form clearly indicates, under the "brief description of the initiative" section, that Applicant's employees were "requesting high level requirements to perform a test with Cardmembers offering Invest on the Card," wherein "clients can purchase mutual funds on their AMEX credit

card.” This Profile establishes further reduction to practice of the invention because it discloses the request to develop requirements to test the invention.

10. Also in 1994, inventor Mr. Rockell Metcalf drafted an internal memo to AMEX that suggests approaching the SEC for an unprecedented exemption required to reduce the invention to practice. This internal memorandum demonstrates continued reduction to practice of the invention because AMEX is continuing its process to obtain the required SEC approval in order to determine the requirements, functions or processes that the SEC may require for reducing the invention to practice.
11. Also during 1994, AMEX further refined the invention in anticipation of the type of approval likely to be obtained from the SEC. This refinement demonstrates continued reduction to practice of the invention because AMEX is continuing its process to obtain the required SEC approval in order to determine the requirements, functions or processes that the SEC may require for reducing the invention to practice.
12. An InterOffice Memo dated February 21, 1996 with “Subject: Securities on the Card Meeting” (Exhibit C) was sent by AMEX employee Jim Kerkow to various other AMEX employees to inform them of an upcoming meeting regarding the invention. The Memo included as attachments an agenda for a February 27, 1996 “Securities on the Card Design Team Meeting,” wherein the meeting Objective is stated as “to develop and recommend an operational view of what a pilot of Securities on the Card should look like.” The listed agenda and deliverables for discussion also include developing operational flows, answering questions, gathering data and developing recommendations. This InterOffice Memo shows further reduction to practice of the invention because it discloses the numerous process steps and decisions needed to be completed before the invention could be implemented.
13. A “Project Approach” memorandum (Exhibit D) was also created in 1996. The Project Approach memorandum outlines anticipated project team roles and responsibilities which are needed as part of AMEX’s reduction to practice of the invention.



14. A functionality chart entitled "Privileged Assets Functionality – Current RCP Remittances & Settlement Process" (Exhibit E) was originally created prior to November 17, 1997, as is evidence by the revision date on the bottom of the chart (the chart also includes a fax date of November 25, 1997) . The functionality chart divides various system responsibilities that need to be completed for AMEX to reduce the invention to practice.
15. A powerpoint presentation dated December 15, 1997 (Exhibit F) provides an overview of the invention's objectives and progress at that time. The presentation also outlines the regulatory constraints and new regulatory developments at the time that "opened the way for AMEX to re-assess the feasibility of offering card billing." The presentation also demonstrates continued reduction to practice of the invention because the presentation outlines solutions to be developed in order "to enable card billing functionality 2Q98."
16. In 1997, senior AMEX management authorized approaching the SEC to seek approval from the SEC for reducing the invention to practice, so inventor Rockell Metcalf called the SEC to inquire about approval. This process demonstrates continued reduction to practice of the invention because AMEX is continuing its process to obtain the required SEC approval in order to determine the requirements, functions or processes that the SEC may require for reducing the invention to practice.
17. Also in 1997, AMEX later received a Notice of Violation from the SEC relating to AMEX's internal efforts to implement the invention. AMEX was obligated to comply with this Notice of Violation. Without the requisite SEC approval, AMEX was prevented from undertaking any major steps toward implementation or reduction to practice of the invention.
18. In response to the Notice of Violation, AMEX then prepared and filed a request for an exemption of the applicable SEC regulations based upon public policy considerations. This SEC request demonstrates continued reduction to practice of the invention because AMEX is continuing its process to obtain the required SEC approval in order to determine the

requirements, functions or processes that the SEC may require for reducing the invention to practice.

19. Billing Data Flow and Account Setup Data Flow documents (Exhibit G) were created on or before March 11, 1998 (the documents indicate a facsimile stamp of March 11, 1998). These Data Flow documents demonstrate continued reduction to practice of the invention because the documents disclose the proposed functions of different systems and the proposed data flowing through those systems as part of AMEX's reduction to practice of the invention.
20. Inventor Rockell Metcalf received an internal AMEX Memorandum dated May 11, 1998 from Brian Kleinberg (Exhibit H) setting forth the agreed upon strategy for obtaining the required SEC approval and setting forth details regarding AMEX's proposed reduction to practice of the invention. This AMEX Memorandum demonstrates continued reduction to practice of the invention because AMEX is continuing its process to obtain the required SEC approval in order to determine the requirements, functions or processes that the SEC may require for reducing the invention to practice.
21. Inventor Rockell Metcalf was copied on an internal AMEX memorandum dated June 10, 1998 (Exhibit I) confirming that AMEX is still in the process of obtaining SEC approval and outlining the allocation of responsibility for the risks associated with the invention. This AMEX Memorandum includes a ten (10) page attachment which is a proposed letter from AMEX to the SEC. The proposed letter outlines the intended process of the invention and the regulatory issues raised by the intended process in an effort to obtain a non-enforcement decision from the SEC. This AMEX memorandum and the attached letter demonstrates continued reduction to practice of the invention because AMEX is continuing its process to obtain the required SEC approval in order to determine the requirements, functions or processes that the SEC may require for reducing the invention to practice.
22. An AMEX document entitled "Investing On the Card Market Test" dated June 22, 1998 (Exhibit J, which includes the cover page only because the remaining portion of the

document is considered confidential) discloses various details related to the invention, along with its proposed design, cost estimates, controls and other business items. This AMEX document demonstrates continued reduction to practice of the invention because AMEX is continuing its testing process as part of reducing the invention to practice.

23. Inventor Rockell Metcalf was copied on an internal email dated July 1, 1998 (Exhibit K) discussing whether or not to include mutual funds as an investment item in the invention. This AMEX email demonstrates continued reduction to practice of the invention because AMEX is continuing its process to obtain the required SEC approval in order to determine the requirements, functions or processes that the SEC may require for reducing the invention to practice and AMEX's ongoing efforts to analyze certain issues related to reducing the invention to practice.
24. AMEX sent a letter dated September 8, 1998 (Exhibit L) to the SEC to obtain assurances that the SEC would not recommend an enforcement action against AMEX if AMEX implemented and operated the invention for its cardmembers. The letter outlines the proposed system and provides a detailed analysis of the related regulatory issues. This letter demonstrates continued reduction to practice of the invention because AMEX is continuing its process to obtain the required SEC approval in order to determine the requirements, functions or processes that the SEC may require for reducing the invention to practice.
25. Inventor Rockell Metcalf received an internal memorandum dated September 11, 1998 (Exhibit M) regarding a revised strategy for working with the SEC and obtaining the required SEC approval. This memorandum demonstrates continued reduction to practice of the invention because AMEX is continuing its process to obtain the required SEC approval in order to determine the requirements, functions or processes that the SEC may require for reducing the invention to practice.
26. Inventor Rockell Metcalf sent a letter, via facsimile, dated October 1, 1998 to the SEC (Exhibit N) explaining the existing AMEX requirements for the invention, along with a

promise to submit a summary of the overall federal and state regulatory regime which would govern AMEX's implementation of the invention. This letter demonstrates continued reduction to practice of the invention because AMEX is continuing its process to obtain the required SEC approval in order to determine the requirements, functions or processes that the SEC may require for reducing the invention to practice.

27. On October 27, 1998, AMEX sent a facsimile letter (Exhibit O) to its outside counsel (Snell & Wilmer, L.L.P), along with the letter set forth in Exhibit L, informing them that additional disclosure information will be provided. The letter requested that they analyze the proposed invention to determine a strategy for obtaining intellectual property protection for the invention. The letter also indicates that the AMEX General Counsel's Office sent the appropriate forms to the AMEX employees working on the invention in order to initiate the patent application process in accordance with the then-current AMEX intellectual property policy.
28. On November 3, 1998, AMEX's representatives, including inventor Rockell Metcalf, met with the SEC, as evidenced by the meeting agenda and the various accompanying documents set forth in Exhibit P, to discuss the issues related to the requested approval in order to implement the invention. The agenda and documents demonstrate continued reduction to practice of the invention because AMEX is continuing its process to obtain the required SEC approval in order to determine the requirements, functions or processes that the SEC may require for reducing the invention to practice.
29. Also on November 3, 1998, an AMEX email (Exhibit Q) was distributed internally to update AMEX officers on the progress of the discussions with the SEC and inform them that additional information may need to be supplied to the SEC and that the AMEX proposal to the SEC may need to be restructured. This email demonstrates continued reduction to practice of the invention because AMEX is continuing its process to obtain the required SEC approval in order to determine the requirements, functions or processes that the SEC may require for reducing the invention to practice.

30. On November 5, 1998, inventors Rockell Metcalf and Suzanne Crane received an internal AMEX email, along with an attachment (Exhibit R), discussing the design and content for revising billing statements in conformance with the invention. This AMEX email demonstrates continued reduction to practice of the invention because AMEX continued to develop certain aspects of the invention, namely, revised billing statements that disclose contributions into a brokerage account.
31. The email thread set forth in Exhibit S shows that on November 6, 1998, Snell & Wilmer attorney Howard Sobelman sent an email to AMEX recommending that a clearance search be conducted to determine if the invention is patentable. After obtaining the appropriate approvals, AMEX sent an email to Howard Sobelman on November 10, 2004 authorizing the recommended clearance search. Howard Sobelman then sent a letter dated November 11, 1998 (Exhibit T) to Washington Patent Services Corp. instructing them to conduct the referenced search. Washington Patent Services Corp. sent a letter dated November 17, 1998 to Howard Sobelman enclosing the results of the search (Exhibit U). On December 8, 1998, after analyzing the numerous patents disclosed in the search, Howard Sobelman reported the results to AMEX (Exhibit V, which includes only the first page which is redacted because the document is considered confidential) and recommended pursuing a patent application for the invention. This process demonstrates continued reduction to practice of the invention because it is the required AMEX process for pursuing patent protection.
32. Upon receipt of the recommendation from Howard Sobelman, in accordance with the then-current AMEX intellectual property policy, a New Invention Disclosure Form and Patent Checklist was completed, which, along with other disclosure documents, were sent to Howard Sobelman on January 6, 1999, (Exhibit W). During the course of preparing the patent application, Howard Sobelman requested additional information and clarification on certain functions during various conference calls. This process demonstrates continued reduction to practice of the invention because it is the required AMEX process for pursuing patent protection.

33. AMEX sent a letter dated January 11, 1999 to J&H Marsh and McLennan (Exhibit X) regarding surety, bond and regulatory issues related to reducing the invention to practice. This AMEX letter demonstrates continued reduction to practice of the invention because AMEX is continuing to address issues related to surety, bonds and regulations as part of its reduction to practice of the invention.
34. AMEX first published its Project Definition Report (Exhibit Y, which includes only the memo, cover page and table of contents because the remaining pages are considered confidential) for the invention on February 16, 1999. The Project Definition Report was subsequently revised on March 4, 1999. AMEX requested internal approvals on the final draft of the Report on March 15, 1999. This Report outlines extensive details for reducing the invention to practice. This Report demonstrates continued reduction to practice of the invention because AMEX is further developing the detailed requirements for reducing the invention to practice.
35. On April 16, 1999, inventor Suzanne Crane sent Howard Sobelman, via facsimile, additional disclosure documents (Exhibit Z) to supplement the draft patent application. Howard Sobelman sent an email dated April 21, 1999 (Exhibit AA) requesting further clarification from inventor Suzanne Crane and Suzanne Crane responded with answers in various emails dated April 28, 1999 (Exhibit BB). In attachment to an email dated April 28, 1999 (Exhibit CC), Suzanne Crane also provided Howard Sobelman with a copy of the Project Definition Report set forth in Exhibit Y. This process demonstrates continued reduction to practice of the invention because it is the required AMEX process for pursuing patent protection.
36. Howard Sobelman sent a revised draft of the patent application (Exhibit DD) to Suzanne Crane on April 30, 1999 requesting that all inventors review the patent application. Suzanne Crane sent her comments on the draft patent application to Rockell Metcalf, via facsimile, on May 27, 1999 (Exhibit EE). Over the next few months, each AMEX inventor provided input to Howard Sobelman, along with various updated drawings, flowcharts and technical clarifications. Howard Sobelman sent an email dated October 5, 1999 to Suzanne

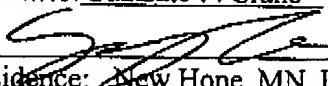
Crane and Rockell Metcalf, along with a copy of a further revised draft of the patent application, requesting their review (Exhibit FF). In various emails dated October 8, 1999 and October 11, 2005 (Exhibit GG), the inventors provided additional comments and revisions to Howard Sobelman. Once the inventors provided their approval of the patent application, Howard Sobelman finalized the patent application, and prepared the associated declarations and assignments for filing with the United States Patent and Trademark Office. This process demonstrates continued reduction to practice of the invention because it is the required AMEX process for pursuing patent protection for this invention.

37. As set forth in the email dated October 12, 1999 from Rockell Metcalf to Howard Sobelman (Exhibit HH), in accordance with AMEX policy, it was necessary to obtain approval from the Transaction Card lawyer prior to filing the patent application. This process demonstrates continued reduction to practice of the invention because it is the required AMEX process for pursuing patent protection for this invention.
38. Snell & Wilmer filed the patent application covering the invention on October 12, 1999.
39. We do not know, and do not believe, that this invention has been in public use or on sale in this country, or patented or described in a printed publication, in this or in a foreign country, for more than one year prior to the filing of our patent application.
40. We hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the above-referenced application or any patent issuing thereon.

Full name of first joint inventor: Suzanne P. Crane

Inventor's signature: \_\_\_\_\_ Date: \_\_\_\_\_

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Full name of first joint inventor: Suzanne P. CraneInventor's signature: Date: 11-15-2005City/State/Country of Residence: New Hope, MN, USAMailing Address: 5249 PennsylvaniaCity/State: New Hope, MN Zip Code: 55428 Country: USACitizenship: United States of AmericaFull name of second joint inventor: Marcus Sheire

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B.H.Full name of fifth joint inventor: Joan Prairie

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Citizenship: USA

# **EXHIBIT A**

WILLKIE FARR & GALLAGHER

MEMORANDUM

WB-34

TO: American Express Travel Related Services Company, Inc.  
RE: The American Express Funds: Asset Builder Program  
DATED: September 14, 1990

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SUMMARY

This Memorandum addresses legal issues arising under the federal securities laws in connection with offering American Express Cardmembers ("Cardmembers") the opportunity to invest in The American Express Funds (the "Company") through payments of their American Express Card bills. (For ease of reference, this program is referred to in this Memorandum as the "Asset Builder Program" or the "Program.") Implementation of the Program raises a number of legal issues under the federal securities laws.<sup>1</sup> In general, however, we believe that these laws should not impose substantial restraints on the Program, except in two areas: (1) the collection of moneys by American Express Travel Related Services Company, Inc. ("TRS"), an entity that is not registered as a broker-dealer under federal securities laws, and (2) the investment by TRS of its own assets on a fixed date on behalf of a Cardmember in advance of receipt of payments by the Cardmember. Complex issues are raised concerning the collection of moneys under the Program.

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<sup>1</sup> While it is beyond the scope of this Memorandum to survey applicable law in all states in which the Program might become available, we have included general references to possible concerns arising under state securities laws.

Although several resolutions to these issues present themselves, each of them involves disadvantages from legal and business perspectives. In addition, neither TRS nor AESC could invest its own assets on behalf of Cardmembers in advance of receipt of payments by Cardmembers without violating applicable credit regulations. Nevertheless, with certain modifications -- which are suggested herein -- we are of the view that the Program could be established in conformance with the federal securities laws. In view of the novelty of the Program, however, we recommend meeting with the National Association of Securities Dealers, Inc. and perhaps with the staff of the Securities and Exchange Commission and representatives of certain state securities commissions, as well.

#### BACKGROUND INFORMATION

##### The Company

The Company, an open-end management investment company organized as a Massachusetts business trust, is a series company that offers investors a selection of nine investment funds (the "Funds"). Shares of the Funds are offered by American Express Service Corporation ("AESC"), a wholly-owned subsidiary of TRS. AESC is registered with the Securities and Exchange Commission (the "Commission") as a broker-dealer and an investment adviser. AESC is also registered with all states that require registration of broker-dealers and investment advisers. Two Funds (the "Fixed NAV Funds") are no-load money



market funds that seek to maintain a constant net asset value of \$1.00 consistent with Rule 2a-7 under the Investment Company Act of 1940, as amended (the "1940 Act"). The value of shares of the remaining seven load Funds (the "Fluctuating NAV Funds") fluctuates in relation to the value of their portfolio assets.

#### The Asset Builder Program

We understand that the Asset Builder Program is proposed to operate as follows:

- A Cardmember would notify AESC of the amount the Cardmember intends to invest in the Company on a monthly basis (the "Intended Investment Amount"). Presumably, Cardmembers would also designate the Fund or Funds into which investments made under the Program would be invested. A Cardmember must enroll or re-enroll in the Program in writing; the Intended Investment Amount and, we assume, the Fund or Funds designated for investment could be changed, and participation in the Asset Builder Program could be terminated, by telephone.
- The Intended Investment Amount would be reflected on the monthly American Express Card billing statement (the "Monthly Statement") as an amount due or as a reminder to remit such amount.
- A Cardmember would send a single check in payment of his or her American Express Card bill along with an amount not exceeding the Intended Investment Amount to TRS to be received at a TRS operations or processing center in one of seven states.
- A Cardmember may also make payment of his American Express Card bill and an amount not exceeding the Intended Investment Amount at a local TRS Travel Service office.
- Amounts received by TRS for investment in the Company would be forwarded by TRS to The Shareholder Services Group, Inc. ("TSSG"), the Company's transfer agent, for investment in the Funds previously designated by Cardmembers.

Amounts would be forwarded as promptly as possible, but it may take three to four days to process payments received.

- Both the Fixed NAV Funds and the Fluctuating NAV Funds would be available for investment under the Asset Builder Program.
- Descriptions of the Asset Builder Program could be contained in general advertising and solicitation materials describing the American Express Card produced and distributed by TRS (e.g., American Express Card benefit books, direct mail solicitations, American Express Card applications, television advertisements).
- Each Cardmember would be provided with a copy of the relevant Fund's prospectus before or at the time he enrolls in the Asset Builder Program, which prospectus will contain appropriate disclosure concerning the Program.

We understand that there are three alternative methods under consideration for investing Intended Investment Amounts in the Company, as follows:

Alternative No. 1 -- Fixed Date Investment. Under this alternative, TRS would invest the Intended Investment Amount from its own assets in the appropriate Fund or Funds in the name of the Cardmember on a fixed date after the American Express Card bill had been sent to the Cardmember. Although a Cardmember would pay his bill after such fixed date, the investment would be deemed to have been made by the Cardmember on the date the investment was made by TRS. If a Cardmember failed to invest all or some part of the Intended Investment Amount within the time permitted for payment of his American Express bill, shares of the Company purchased on his behalf would be sold in an amount sufficient to reimburse TRS for the difference between the

Intended Investment Amount and the amount, if any, paid by the Cardmember. The redemption proceeds would be remitted to TRS. Failure to pay the full Intended Investment Amount a certain number of times would result in termination of the Asset Builder Program with respect to the Cardmember.

Alternative No. 2 -- Overpayment Investment. Under this alternative, the amount received that exceeded the amount of regular American Express Card bill charges would be separately identified and transferred to TSSG for investment in the Company on behalf of the Cardmember. Such amount, not to exceed the Intended Investment Amount, would be invested at the time received from the Cardmember.

Alternative No. 3 -- Sweep Investment. Under this alternative, any credit balance created by a Card transaction up to the Cardmember's Intended Investment Amount would be automatically transferred to TSSG for investment in the Company on behalf of the Cardmember.

#### DISCUSSION

Implementation of the Asset Builder Program under one or more of the three alternatives described above raises a number of issues under federal securities laws, involving advertising, the collection of moneys, extension of credit (margin) and the pricing of share purchases. We discuss below each of these areas in turn, after which certain miscellaneous matters are addressed. Finally, in the Appendix to this Memorandum we provide guidance

with respect to specific questions and issues raised in a letter dated August 16, 1990 from Timothy J. Heine, Esq. to Burton M. Leibert, Esq.

#### Advertising

Two legal issues are raised by the proposed methods of advertising the Asset Builder Program as described above: (1) the limitations on including an advertisement for the Asset Builder Program in materials describing the Card and (2) the extent to which TRS, rather than AESC, can be featured in sales material and advertisements describing the Asset Builder Program. In general, we believe that neither issue should impose substantial restraints on the proposed Program.

Joint Card/Program Advertising. The staff of the Commission has recently articulated guidelines for the preparation of newsletters and similar periodic publications by investment companies.<sup>2</sup> The ICI Letter specifically addresses the permissibility of incorporating material governed by Rules 134, 135a and 482 under the Securities Act of 1933, as amended (the "1933 Act"), with material that would not fall within the scope of such Rules ("non-Rule material"). A discussion of the various advertising rules applicable to investment companies is beyond the scope of this Memorandum. Under those rules, however, an advertisement describing the Program could be crafted to come within the itemized information permitted under Rule 134 and,

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<sup>2</sup> See Investment Company Institute, SEC No-Action Letter (January 19, 1990) (the "ICI Letter").

since the Company's Prospectus and Statement of Additional Information presumably would be amended to describe the operation of the Asset Builder Program, advertising describing the Program could also satisfy the requirements of Rule 482.<sup>3</sup> The ICI Letter states that non-Rule material may be included in a newsletter<sup>4</sup> containing information permitted under Rule 134 and/or Rule 482 if it does not constitute an "offer" of a security under the 1933 Act. Information not constituting an offer would be considered "free writing" material that could be included together with a description of the Asset Builder Program, provided it is segregated from that material.

Whether material is permissible "free writing" or an impermissible "offer" depends on what it says. Generally, according to the ICI Letter, newsletter material would probably constitute an offer if it directly or indirectly promoted or encouraged a decision by the reader to make an investment in a particular fund or funds offered or about to be offered by the sponsor. Each advertisement describing the Asset Builder Program must be analyzed individually against this standard. In

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<sup>3</sup> Both Rule 482 and Rule 134 require that legends be placed on advertisements stating from whom a prospectus containing more complete information about the Company, including expenses and charges, may be obtained and that an investor should read the prospectus carefully before investing. Such legends will need to be placed on all joint Card/Program advertising.

<sup>4</sup> The ICI Letter by its terms relates only to newsletters and "similar periodic publications." Nevertheless, the guidelines set forth in the letter should be equally applicable to individual advertisements.

developing the format and scope for such advertising, you should be prepared to separate references to the Program from "free writing" relating to the American Express Card and other services available through TRS and the Card.

Use of TRS Name in Advertisements. Article III, Section 35 of the Rules of Fair Practice of the National Association of Securities Dealers, Inc. ("NASD") sets forth basic standards governing communications by NASD members with the public. Section 35(d)(2)(A) provides that each advertisement and piece of sales literature must contain the name of the NASD member; each piece of sales literature also must contain the date on which the material was first published.<sup>5</sup> The NASD has stated publicly

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<sup>5</sup> The NASD distinguishes between "advertisements" and "sales literature", as follows:

(1) Advertisement -- material published, or designed for use in, a newspaper, magazine or other periodical, radio, television, telephone or tape recording, videotape display, signs or billboards, motion pictures, telephone directories (other than routine listings), or other public media.

(2) Sales Literature -- any written communication distributed or made generally available to customers or the public, which communication does not meet the foregoing definition of "advertisement". Sales literature includes, but is not limited to, circulars, research reports, market letters, performance reports or summaries, form letters, standard forms of options worksheets, seminar texts, and reprints or excerpts of any other advertisement, sales literature or published article.

NASD, Rules of Fair Practice, Article III, §35(a).

that the name of an entity other than the NASD member can be shown in an advertisement so long as the name of the member is also shown in a relatively prominent manner. In general, state securities laws permit the use of advertising or sales literature that complies with Commission and NASD rules. Thus, an advertisement or piece of sales literature can focus on TRS or American Express Company as offering the Program, as long as AESC's name is also mentioned or displayed with some prominence.

#### Collection of Moneys

The sending of a single check in payment of both regular charges on a Cardmember's American Express Card bill and amounts paid under the Asset Builder Program should not raise any regulatory concern. However, the collection of moneys under the Asset Builder Program by TRS -- as opposed to AESC, a registered broker-dealer -- does.

In several instances, all of which involved insurance companies, the staff of the Commission has explicitly permitted a single check sent to an insurance company to be used in payment of the purchase price of mutual fund shares and life insurance premiums.<sup>6</sup> In contrast, however, the staff of the Commission has stated on more than one occasion that an agent that receives funds from mutual fund customers would generally be required to register as a broker-dealer under the Securities Exchange Act of

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Boston Mutual Sales Corp., SEC No-Action Letter (January 4, 1973); Investors Insurance Corporation, SEC No-Action Letter (May 10, 1971).

1934 (the "1934 Act"). In one instance the staff stated that dealers or investors could forward orders for fund shares directly to a service agent that would process the orders and send confirmations of transactions to investors for a fee, but suggested that the service agent as a result of providing these services would generally be required to register as a broker-dealer.<sup>7</sup> In another, an insurance company at no charge was permitted to receive amounts to be invested in fund shares and then to remit such amounts to a general agent that was a registered broker-dealer, the staff again suggesting that the insurance company's activities would require it to register as a broker-dealer.<sup>8</sup>

Of course, it would be possible to discuss the matter of TRS's collection of moneys under the Asset Builder Program directly with the staff of the Commission. Recognizing that the no-action letters referred to above were more than fifteen years old, we informally discussed with a member of the Commission's staff the staff's continued adherence to the view that a party receiving orders for fund shares must be registered as a broker-dealer. The staff member stated that, in his view, the staff should be willing to allow a service agent to act as a collection agent in connection with purchases of fund shares

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Investment Company Institute, SEC No-Action Letter (June 13, 1973).

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State Security Life Insurance Company, SEC No-Action Letter (June 7, 1971); see also Investors Insurance Corporation, SEC No-Action Letter (May 10, 1971).



*we could convince*

without becoming a registered broker-dealer if the agent was supervised by a registered broker-dealer that was responsible for the acts of the agent and if no fee were paid directly by customers to the service agent.<sup>9</sup> Thus, if AESC would agree to supervise the activities of TRS and assume responsibility for losses arising from its activities (which may necessitate substantial increases in AESC's capital), it may be possible to convince the staff that there is no real need for direct regulatory control over TRS, which would merely be acting as AESC's collection agent. However, the NASD, as well as the SEC, may very well continue to be concerned about undifferentiated moneys being paid to an unregulated entity. We expect that they would insist, at a minimum, that TRS employees handling money for AESC be treated also as employees of AESC and be subject to AESC's direct supervision and control. In addition, it should be recognized that even if the staff of the Commission were to confirm that TRS may collect money without registration as a

<sup>9</sup> Under Part III of Schedule C to the By-Laws of the NASD, persons associated with NASD members who accept unsolicited customer orders for submission to the member for execution ("Assistant Representatives--Order Processing") must register with the NASD and pass a qualifying examination. Persons associated with a member whose functions are "solely and exclusively clerical or ministerial" are, however, exempt from registration. NASD By-Laws, Schedule C, Part VI § 1(a). Presumably, a person who merely opens envelopes containing moneys in payment for Company shares and American Express Card bill payments, who neither writes order tickets nor communicates with investors, would be considered to be acting in a clerical capacity.

*no acting orders*

broker-dealer, one or more state securities commissions may take a contrary position.

Absent relief from the Commission, it appears that TRS would be required to register as a broker-dealer in each jurisdiction in which it would receive moneys under the Program. As you know, broker-dealer registration involves time, expense and, perhaps more importantly, subjecting TRS's operations to a new regulatory regime. We have considered ways in which the Program could be modified so that moneys are collected by AESC, which would obviate the need for registration by TRS. One or more of these payment alternatives may be unacceptable from a business point of view. Nevertheless, we set them out here for your consideration:

1. Parallel AESC/TRS Offices. An AESC office could be created at each TRS operations center that receives payments on Card bills. Checks could be made payable to "American Express" and mailed to such operations centers. The return envelope or the portion of the American Express Card bill enclosed with the payment could be coded so that only payments from Cardmembers participating in the Asset Builder Program would be directed to the AESC office at the TRS operations center. AESC would then credit back to TRS the amount paid in respect of regular American Express Card charges.
2. Direct Payments to Existing AESC Office. Alternatively, a single check for the aggregate of the Intended Investment Amount and the amount otherwise to be paid on an American Express Card bill could be made payable to and forwarded directly to AESC, which would then credit back the difference between the Intended Investment Amount and the total paid to TRS.
3. Separate Program Checks. As a third alternative, a separate check for the Intended Investment

Amount could be issued to the Company or, if AESC is the payee, it could be sent to a bank (such as Centurion Bank) or to AESC. To facilitate this, a separate envelope addressed to the Fund or to AESC could be enclosed with the Monthly Statement.

Each of the above presents different regulatory and/or business concerns. We think that the most useful approach may be the first one, although the third alternative is cleanest from a regulatory standpoint. The first alternative, by having only payments by those Cardmembers participating in the Program directed to AESC, reduces the logistical and other problems of the second alternative, which contemplates having AESC, a thinly-capitalized broker-dealer, assume control over what we assume are billions of dollars of Cardmembers' bill payments merely for the purpose of collecting what may well be a very small portion of that amount. The net capital requirements applicable to AESC will increase substantially as a result of AESC's receipt of the aggregate bill and Program payments of all Cardmembers, whether participating in the Program or not. AESC's net capital would be affected to a lesser extent if only aggregate payments from Program participants were directed to it, and it would be unaffected if a separate check for amounts paid under the Program were made out to the Company, as is contemplated as part of the third alternative. (We would be pleased to discuss with you the specific net capital implications for AESC of receiving bill payments, or you may wish to raise this issue with your accountants.) The first

alternative also avoids the use of two checks, which the third alternative contemplates and which may discourage investing and run counter to the philosophy underlying the Program. It should be noted, however, that the cost of substantially increasing AESC's capital may nonetheless warrant following the separate check approach in Alternative No. 3.

The first alternative would require the creation of additional AESC offices throughout the country. In the absence of a contrary interpretation from the NASD, each office would be required to have a registered principal on site. We are cautiously optimistic that the NASD could be persuaded that this would not be necessary since (1) the AESC employee's activities would be limited to opening envelopes, (2) no sales of securities would occur at the site and (3) no person would be dealing with the public or commenting on whether Company shares represent a suitable investment. In discussions with the NASD on this matter, it would probably be helpful to have amended AESC's compliance manual to provide for the collection of moneys at the new locations and the forwarding of such amounts to TSSG and to undertake to perform a quarterly internal audit of compliance with those procedures. Given the large number of TRS Travel Service offices, opening an AESC office in each such location would no doubt prove unworkable. This may necessitate a decision not to accept Intended Investment Amounts at TRS Travel Service offices and to require

that they be sent by mail by the Cardmember-investor to a TRS operations center.

#### Extension of Credit

Alternative No. 1, described above as the "Fixed Date Investment", involves the investment by TRS of its own assets on behalf of Cardmembers in advance of receipt of payments by Cardmembers. This payment alternative raises an issue under Regulation G, promulgated by the Board of Governors of the Federal Reserve System, if TRS advances amounts to Cardmembers for the purchase of Company shares and under Section 11(d)(1) of the 1934 Act and the Federal Reserve Board's Regulation T.

Regulation G applies to persons other than banks, brokers or dealers who extend or maintain credit secured directly or indirectly by margin stock. It limits the loan value of the collateral securing the credit if the purpose of the credit is to buy, trade in or carry margin stock ("purpose credit").<sup>10</sup> "Margin stock" includes any security issued by a registered investment company (with certain limited exceptions not relevant here).<sup>11</sup> Generally, no Regulation G lender may extend purpose credit in an amount that exceeds 50% of the current value of the margin stock involved if the loan is secured, directly or indirectly, by any margin security. Alternative No. 1 would likely violate Regulation G because it involves TRS's extending credit equal to 100% of the value of

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<sup>10</sup> 12 C.F.R. § 207.1(b) (1989).

<sup>11</sup> 12 C.F.R. § 207.2(i)(6) (1989).

the Company shares to be acquired and would likely be deemed to involve a loan indirectly secured by the Company shares being purchased.<sup>12</sup>

If TRS were deemed to be acting as the agent of AESC or if AESC were itself to purchase Company shares in advance of the receipt of Intended Investment Amounts from Cardmembers or, as is likely the case, AESC were deemed to have "arranged" the extension of margin credit by TRS, AESC would violate Section 11(d)(1) of the 1934 Act and Regulation T. Section 11(d)(1) prohibits a broker-dealer from extending or arranging for the extension of credit to or for a customer on any security (other than certain exempted securities) that was part of a new issue in which the broker-dealer participated as a member of a selling syndicate or group within 30 days prior to the transaction. Rule 11d1-2 excepts from the prohibition of Section 11(d)(1) an extension of credit for the purchase of mutual fund shares to a person who has held such shares for

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<sup>12</sup> Were the Program to be structured such that in the event of non-payment of the Intended Investment Amount by the Cardmember after TRS or AESC had acquired shares on his or her behalf, neither TRS nor AESC, as the case may be, would have the right to redeem Company shares, or impose a lien against or restrict in any way the Cardmember's withdrawal of the shares before his or her full payment for them, it may be argued that the credit extended was not secured directly or indirectly by shares of the Company. In this event, TRS or AESC, as the case may be, would be placed in the posture of having made an unsecured loan to the Cardmember who fails to pay the Intended Investment Amount. Asserting rights against a defaulting Cardmember may be difficult and, in any event, would involve delay and perhaps expense out of proportion to the amount in default.

more than 30 days. Since under Alternative No. 1 the full purchase price would be advanced at the time of the customer's purchase and at a time when AESC was the principal underwriter of the Company's shares, the exception provided by Rule 11d1-2 would not apply and the prohibition contained in Section 11(d)(1) would bar AESC from advancing the purchase price of Company shares to Cardmembers, or arranging for any such advance.<sup>13</sup> If an entity other than AESC were to advance the funds, it is nevertheless likely that AESC would be deemed to have "arranged" the credit, which would also involve a Regulation T violation.

Regulation T governs the extension and arrangement of credit by brokers and dealers and imposes, among other things, initial margin requirements and payment rules on securities transactions. Under Regulation T a broker or dealer may not extend purpose credit otherwise than in a margin account and may not extend credit in a margin account that exceeds 50% of the current market value of a margin security. As under Regulation G, the term "margin security" includes shares issued by registered open-end investment companies. Again, Alternative No. 1 would violate Regulation T since it

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<sup>13</sup> Section 11(d)(1) and Rule 11d1-2 thereunder would present no obstacle if the extension of credit were secured only by Company shares held for more than 30 days and the credit extended did not exceed 50% of the value of those shares. Implementing this approach, however, would seem to present operational difficulties.

contemplates AESC's advancing, or arranging to have advanced, 100% of the value of the Company shares purchased.

Alternative No. 1 also exposes the entity extending credit to purchase Fluctuating NAV Fund shares to the risk of a failure by a Cardmember to pay the Intended Investment Amount for such shares. In this event, TRS or AESC, as the case may be, would liquidate the Fund shares acquired, but would incur a loss to the extent that the value of the Fund shares on the date of purchase exceeded their value on the day redeemed. It has been the long-standing position of the staff of the Commission that where investors fail to make payment for shares ordered and the purchase order is, as a result, reversed, any loss should be borne by the principal underwriter of the fund involved, rather than by the fund itself.<sup>14</sup> In such an instance, AESC as the principal underwriter of the Company's shares should have recourse against the Cardmember who failed to make the required payment, but this may be of questionable value to AESC in light of the time and costs of recovery.<sup>15</sup>

#### Pricing of Share Purchases

Rule 22c-1 under the 1940 Act prohibits a registered investment company from issuing any redeemable security, and

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<sup>14</sup> See Investment Company Act Release No. 6,366 (March 5, 1971).

<sup>15</sup> Conceivably, a court could refuse to enforce AESC's claim against a Cardmember who failed to make a required payment because of AESC's having violated the margin rules by extending the credit.



prohibits a principal underwriter of such security from selling, redeeming or repurchasing any such security, except at a price based on the current net asset value of such security that is next computed after receipt of an order to purchase or sell such security.<sup>16</sup> The staff of the Commission has permitted limited exceptions to the requirement that a purchase order be priced at the next determined net asset value, none of which are of precedential value in this instance. One exception would permit a money market fund to effect orders at the net asset value determined on the second business day after receipt of payment.<sup>17</sup> The rationale for permitting this practice was that, since money market instruments settle the day after the order to purchase them is given, time would be given to convert checks received into federal funds for the settlement of the purchase of money market instruments, which conversion was represented as generally taking two days to accomplish. Recent conversations with the staff of the Commission suggest that similar relief would not be available where portfolio securities in which the subject fund invested settled beyond one day. The second exception would permit a fund to have a two-day delay in pricing an initial purchase order where fund shares were sold in connection with a life

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<sup>16</sup> 17 C.F.R. § 270.22c-1(a) (1989).

<sup>17</sup> Scudder Managed Reserved, Inc., SEC No-Action Letter (April 21, 1977); see also Scudder Tax Free Money Fund, SEC No-Action Letter (July 16, 1982).

insurance policy.<sup>18</sup> The staff seemed to recognize that for an initial purchase, additional time would be needed to process the insurance application for such purposes as investigating the insurability of the covered person.<sup>19</sup>

Since the limited exceptions to the general rule do not apply in the instant case, it appears that investors in Company shares must receive the price next determined after the close of business on the New York Stock Exchange on the date fixed for the acquisition of shares by TRS or AESC on behalf of Cardmembers in the case of Alternative No. 1, on the day the Intended Investment Amount is received by AESC in the case of

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18 Life Investors Management Corp., SEC No-Action Letter (September 6, 1974).

19 Two other instances have arisen in which the staff of the Commission has permitted shares to be priced at other than the price next determined after receipt of the order, both of which have been characterized by the staff as "unique circumstances" where compliance with Rule 22c-1 was "highly impractical, if not impossible." Dreyfus Index Fund, SEC No-Action Letter (September 21, 1987). In Investment Company Institute, SEC No-Action Letter (December 8, 1975), a fund and its principal underwriter were permitted to hold a customer's purchase order and funds for an individual retirement account until the end of a seven-day disclosure period mandated by the Internal Revenue Service and consummate the investment at the price next determined after the end of such period. Templeton Global Fund, SEC No-Action Letter (September 7, 1982), involved a situation where no fund shares were available for investment at the time the order was received because of a limit on the number of shares that could be issued at any one time. In this case orders for the purchase of shares were held in a "suspense account" for up to 10 days and, if such orders were accepted during the period, shares were sold at the offering price next determined after acceptance of the order.

Alternative No. 2 and on the date a transaction occurs giving rise to a credit in the case of Alternative No. 3. It should be emphasized that Rule 22c-1 pertains to pricing the shares purchased under the Program; it does not require transmission of moneys to the Company's account at the time shares are priced.

An issue that may arise in the operation of the Program concerns so-called "as of" transactions. Given the volume of American Express Card billing payments received, and the possibility of a computer breakdown or other problem at the processing location, it may be impossible on certain days to process all orders for Company shares received on the day received, and a backlog may, therefore, occur.<sup>20</sup> The backlogged orders, however, cannot be processed on subsequent days at prices determined on those subsequent days without violation of Rule 22c-1 under the 1940 Act. Thus, the directors of the Company must determine when it is in the best

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<sup>20</sup> The staff of the Commission has stated that Rule 22c-1 requires investors to receive the price next determined after the mail containing a purchase order is received, rather than that determined after the mail is opened. See Dreyfus Liquid Assets, Inc., SEC No-Action Letter (January 15, 1975) and Dreyfus Index Fund, SEC No-Action Letter (August 21, 1987); see also Investment Company Act Release No. 5,569 (December 27, 1968) (announcing staff position that the time of receipt of an order by a retail broker, rather than the fund's underwriter, is controlling under Rule 22c-1). In order to reduce the risk that orders are not processed in a timely manner, perhaps the return envelopes of Cardmembers participating in the Program could be coded so that these envelopes could be processed first.

interests of the Company to stop sales and refuse such orders or to process them the next day or days "as of" a prior day's price. In the absence of a chronic backlog or of a material dilution of the Fund's existing shareholders, pricing on an "as of" basis would seem to be in the best interest of the Company should a backlog develop under the Program. If a chronic backlog developed because of the volume of transactions, the staff's position would probably be that sales be stopped and mechanisms put in place to handle ordinary order flow.<sup>21</sup> Another issue presented by the backlog problem is whether the cash flow from the purchase orders is available to the Company on a current basis. The Program should be designed to avoid a delay in the receipt of a material amount of the proceeds of the issuance of Company shares so that American Express is not profiting from "float" resulting from any excessive delay in investing assets in the Funds. It would not be necessary, however, that the Company receive proceeds from the sale of shares of the Fluctuating NAV Funds in fewer than seven calendar days from the time the purchase order is priced; federal funds from the sales of Fixed NAV Fund shares should be received by the Company on the day after the order is received.

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<sup>21</sup> See Letters from Stephen K. West, on behalf of the Investment Company Institute, to Kathryn B. McGrath, dated February 5, 1985 and October 11, 1985.

## Miscellaneous

Monthly Statement. To our knowledge, there is no statutory prohibition against calling the maximum amount to be invested by a Cardmember under the Program an "Investment Commitment" or a like term or against placing this term as a line item on the Monthly Statement immediately following the regular Card charges incurred, reflecting the Investment Commitment as part of the total payment due. However, we can imagine that a federal or state regulator might consider this approach to be confusing to Cardmembers and perhaps misleading. Consequently, we suggest that the language placed on the Monthly Statement referring to the maximum amount payable under the Asset Builder Program should avoid any suggestion that the amount is a fixed charge to, or an obligation or debt of, the Cardmember. Rather, the words selected should reflect the voluntary nature of the payment. In this regard, we would suggest using the term "Intended Investment Amount" or a like term, rather than the word "commitment" and that the line item showing such amount on the Monthly Statement be placed below the Card Total. If individual state regulators object to the formatting or terminology used on the Monthly Statement, it may be necessary to tailor the Statement sent into the state or states in question to comply with their particular requirements.

Asset Builder Program Fee. If a separate fee were to be charged to Cardmembers in connection with participation in the Asset Builder Program, two issues would be raised. A

payment to TRS could be interpreted as a transaction charge, lending support to the position that TRS was functioning as a broker and should be registered as such under the 1934 Act.<sup>22</sup> Such amounts -- whether paid to AESC or TRS -- also should raise the question whether they were a sales load within the meaning of Section 2(a)(35) of the 1940 Act.<sup>23</sup> In either event, it could be argued in response that any fee received was an administrative handling charge for the collection of funds and the transfer of those funds to TSSG and was not received in connection with the sale of shares. We recommend that this issue be discussed with the staff of the Commission, and perhaps a no-action letter be requested to confirm the nature of the charge before imposition in connection with the Program. The staff of the Commission typically responds within 30 days to a no-action request.

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22 The staff of the Commission has suggested that a charge imposed by a service agent for sending confirmations of mutual fund sales is a sales expense because it involved a charge for sales or promotional activities. Investment Company Institute, SEC No-Action Letter (June 13, 1973).

23 Section 2(a)(35), in part, defines "sales load" to mean the difference between the price of a security to the public and that portion of the proceeds from its sale which is received and invested and held for investment, less any portion of such difference deducted for trustee's or custodian's fees, insurance premiums, issue taxes or administrative expenses or fees which are not properly chargeable to sales or promotional activities. At the time that the Company's registration statement was initially reviewed by the Commission's staff, the issue was raised whether the \$50 annual account charge was a "sales load" under Section 2(a)(35) of the 1940 Act, the staff ultimately concluding that it was not.

Availability of Asset Builder Program for Purchases of Shares of Related Funds. There does not appear to be any legal impediment to the Asset Builder Program's being structured to permit the purchase of shares of mutual funds for which Shearson Lehman Brothers Inc. or IDS Financial Corporation serves as principal underwriter. Currently, Shearson-fund shares are available only to Shearson brokerage customers. For this reason, a correspondent relationship between AESC and Shearson would probably need to be established, or AESC could establish an omnibus account with Shearson, in order to effectuate share purchases under the Program.<sup>24</sup> Moreover, disclosure and other mechanical problems may arise were Shearson- or IDS-sponsored funds to be used in the Program. For example, the prospectus delivery requirement would be complicated by the fact most Shearson funds have separate prospectuses.

Hierarchy Among Asset Builder Program, Membership Savings and Privileged Assets. We are not aware of any legal constraints on establishing a hierarchy of investing and saving

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<sup>24</sup> In an omnibus account, shares of the Company would be held of record in AESC's name, and AESC would keep detailed records of the shares' beneficial owners. While presenting certain problems it would avoid a situation where the beneficial owner receives Shearson account statements -- a feature of an arrangement where AESC, as correspondent, "introduces" the account to Shearson on a "fully disclosed basis." Alternatively, it may be possible to open sales to non-Shearson customers, but we suppose that this procedure could require substantial changes to the transfer agency arrangements now in place for the Shearson funds.

with the American Express Card among the Asset Builder Program, Privileged Assets and Membership Savings. Of course, appropriate disclosure would need to be made of the order of investing and redeeming.

Issues under Alternative No. 3. Alternative No. 3 would operate like a sweep feature, automatically investing American Express account credit balances in Company shares. Sweep features have been implemented between securities brokerage accounts and money market funds upon full disclosure to securities brokerage account customers. Sweep features do not themselves raise legal concerns; however, they may cause practical problems. For example, sweeping credit balances tends to increase transfer agency and transaction costs due to the smaller average account size and transaction size. In addition, the client relations problems raised, as well as the possible economic losses resulting, when credit balances are swept into a Fluctuating NAV Fund are potentially enormous.<sup>25</sup>

#### CONCLUSION

The Asset Builder Program can be structured in a manner that satisfies the legal concerns discussed in this Memorandum. Assuming that a Program structured in this way is acceptable from a business and operational perspective, we

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<sup>25</sup> It should be noted that while the Fixed NAV Funds are money market funds that seek to maintain a constant net asset value of \$1.00, there can be no guarantee that they will be able to do so.



suggest that a meeting with the NASD to discuss the Program at an early stage would be helpful. The NASD is the regulator that is apt to be the first to become aware of comments of third parties about, and complaints by participants in, the Program and it would be important to have them fully aware of the Program. It is also the regulator that has the most direct interest in monitoring the promotion of the Program and the activities of AESC. It may also be useful to meet with members of the staff of the Commission solely for the purpose of informing them about the Program, which may forestall precipitate action on their part should they receive a customer or industry inquiry. Finally, consideration might be given to a similar meeting or informal conversation with members of the Investment Company Registration/Trading Practices Committee of the North American Securities Administrators Association (the "NASAA Committee") in order to reduce the possibility of objections arising at the state level.

\* \* \* \* \*

Attached to this Memorandum as an Appendix are question-by-question responses to the questions raised in the letter of Timothy J. Heine, Esq. dated August 16, 1990 to Burton M. Leibert, Esq. For ease of reference, the responses have been numbered to correspond with the numbering of the questions in that letter.

We trust that this Memorandum provides some guidance as you continue to explore the feasibility of the Asset Builder

Program. Please do not hesitate to contact Burton M. Leibert, Roger D. Blanc, Catherine J. Douglass or Rose F. DiMartino at (212) 935-8000 should you wish to discuss this Memorandum.

WILLKIE FARR & GALLAGHER

cc: Timothy J. Heine, Esq.

## APPENDIX

1. Investments in the Company can be solicited in TRS advertising pieces focusing primarily on the American Express Card, provided that the specific content and legend requirements of Rule 134 and/or Rule 482 under the 1933 Act are complied with and information about the Company is segregated from information about the Card.
2. TRS may collect moneys for investment in the Company, although doing so probably would require TRS to become registered as a broker-dealer under the 1934 Act as well as in various states. If a separate check in the name of the Company were issued for investing in the Company and forwarded to AESC or if AESC offices were set up at TRS operations centers to receive checks, TRS would not be required to obtain any separate license or registration in connection with the Program.
3. The formal characterization of TRS as an agent of AESC or TSSG would not seem to obviate the need for TRS to register as a broker-dealer were TRS to collect payments under the Program. Please note, however, that in this Memorandum we describe an informal discussion with a member of the Commission's staff who held out some hope for a change in regulatory outlook on such an arrangement.
4. Regulation G would bar TRS from extending credit for the purpose of buying Company shares, which credit is secured by these shares when the credit exceeds 50% of the current value of the shares. Section 11(d)(1) of the 1934 Act would bar AESC from extending any amount of credit or arranging for any extension of credit in connection with Company shares, for which it is the principal underwriter, that is secured by the shares purchased. Regulation T would limit any permissible extension of credit by AESC to 50% of the value of the margin security. The restrictions apply equally to the Fixed NAV Fund shares and the Fluctuating NAV Fund shares.
5. Under the existing position of the Commission, it would not be possible to collect moneys for investment in the Company at TRS Travel Service locations, unless TRS registered as a broker-dealer or AESC offices and employees were present in each such location. As indicated in 3 above, it appears that the staff may be willing to consider a change in its position on this matter.

6. The issues arising under Alternative No. 3 tend to be practical rather than legal, i.e., increased expenses to the Funds, customer dissatisfaction due to imposition of a sales load on small investments, public relations problems and potential risk of loss on reversal of transactions when customers fail to understand the operation of the "sweep" feature.
7. Except for disclosures in the Company's prospectus and solicitation materials, no specific disclosures need to be made concerning the Program, including on the Monthly Statement itself, although, from a business perspective, you may deem some information (such as a running tally of the value of investments) to be desirable.
8. Assuming that the Program is structured to have payments under the Program go to AESC instead of TRS and that no fee is charged to Cardmembers in connection with the Program, no regulatory relief is required under the federal securities laws to implement the Program. It would be advisable, however, to meet with representatives of the NASD and, possibly, the SEC and the NASAA Committee before implementation of the Program. Also, you may wish to discuss with AESC's accountants the increase in its net capital requirement that would result from its receipt of moneys under the Program and in payment of regular American Express Card bill charges.
9. Logistical, rather than legal, issues would arise if Shearson- or IDS-sponsored funds were offered in connection with the Program (e.g., prospectus delivery requirements and setting up a correspondent relationship between AESC and Shearson). Shearson- and IDS-sponsored funds that have fluctuating net asset values may present difficult business issues.
10. Assuming appropriate disclosure was made, no legal issues under the federal securities laws would arise if a hierarchy of investing and saving were established among the Asset Builder Program, Privileged Assets and Membership Savings.

# **EXHIBIT B**

## Compliance & Control Profile

Initiative Name: Invest on the Card

**Required for Intake** (This information is used to set up a meeting with the Business Architect Group):

Person Initiating Request: Nyla Andruss  
Phone Number: 612-671-3558  
Business Area Name: Enterprise Cross Sell (purchasing mutual funds on the AMEX credit card)  
Business Unit #: 1517  
This initiative is (select one):  
☐ A new product or service  
☐ A change or enhancement to an existing product or service  
☒ A new system or process  
☐ A change to an existing system or process  
☐ A CSCO Breakthrough Project  
☐ Other

Project Manager: Nyla Andruss  
Project Owner: Lisa Steffes  
Project Sponsor: Jeff Williams

Additional Resources: (people who will need to edit this form) 000nonam

Do you have a Compliance contact? ☐ Yes ☒ No

Legal Contact: Rockell Metcalf

Finance LFO contact: Mark X Riordan

Accounting contact: Mark X Riordan

Initiative Name: Invest on the Card

Initiative Start Date (mm/dd/yyyy): 05/18/2004

This initiative is currently in: Pre-PDP phase

The initiative is expected to rollout in: 4th qtr 2004

Provide a brief description of the initiative: We are requesting high level requirements to perform a test with Cardmembers offering Invest on the Card. In this test, we plan to leverage existing processes that are currently used for Privileged Assets. This means that clients can purchase mutual funds on their AMEX credit card.

Please attach any documents with more initiative details:



Invest on the Card- Test Plan.ppt

Identify the primary high-level deliverables & planned milestones of the initiative:

1. , due
2. , due

# **EXHIBIT C**

VB-34

## **InterOffice Memo**

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**To:** Mike Barnett                      Terri Hasson  
Robin Korn                              Mike Mathias  
Vijay Rangenini                      Mary Ann Ray  
Nancy Rosenberg                      Rich Sykes  
Dave Tolley

**cc:** Maria Flete

**From:** Jim Kerkow

**Date:** February 21, 1996

**Subject:** Securities on the Card Meeting

Thank you for your willingness to participate in our upcoming meeting! Though I don't know each of you personally, it sounds like we have quite a dynamic group and I'm looking forward to a lively and productive meeting! Each of you bring critical experience and insight to the project.

I've attached some background information on this project as well as our objectives for the meeting. Please review this information and feel free to call me at 612/671-2130 if you have any questions.

The meeting will be held in New York City at the World Financial Center on Tuesday, February 27, 1996 from 12:00 noon to 3:00 pm. The meeting will be held in the large conference room on the 45th floor and lunch will be served. If you have questions regarding the logistics of the meeting or location, please contact Maria Flete at 212/640-3988. If we can finish earlier, we will certainly try to do that, however we have much to accomplish and I want to plan ample time to ensure we make the most out of our time together.

Again, thank you in advance for your contribution and I will look forward to seeing you next week!



# **Securities on the Card Design Team Meeting**

**February 27, 1996**

**New York City**

## **Objective:**

The objective of this team is to develop and recommend an operational view of what a pilot of Securities on the Card should look like.

## **Deliverables:**

The team will deliver the following:

- 1. Develop "Stake in the Ground" hypothetical operational flow**
- 2. Develop set of questions which must be answered to validate the hypothetical position.**
- 3. Identify sources of information and data to answer questions.**
- 4. Gather data and information to prove/disprove hypothetical operation**
- 5. Make recommendation for pilot**

## **Meeting Agenda**

- Introductions**
- Overview and Boundaries**
- Design Proposed Operational Flow**
- Identify Open Questions and Resources**
- Plan Next Steps**

## **Securities on the Card**

### **Page 2**

#### **Timeframe**

February 27 New York City	Initial Strategy Meeting Objective: Deliverables 1- 3
February 28 - March 8	Data Gathering
Mid March	Synthesis and Recommendation Meeting
Mid March	Final Report Published
Mid March	Mobilize Implementation Team

#### **Team**

(see attached chart)

## PARALLEL STRATEGIES

*Parallel*  
• TEST OPERATIONAL PROCEDURES WITHIN CURRENT REGULATORY CONDITIONS

•  REQUEST EXEMPTIVE ORDER FROM SEC AND NASD

• PURSUE OTHER PAYMENT PROCESSING IDEAS

## **TEST OPERATIONAL PROCEDURES WITHIN CURRENT REGULATORY CONDITIONS**

### **Factors to Consider**

- There will be NO extension of credit by American Express to any cardmember for the purpose of purchasing securities.
- Timeliness of the trade is critical due to as-of costs.
- The receipt of funds intended for securities purchases is an activity subject to broker/dealer registration and regulation and must therefore be conducted by a registered B/D.
- Process will likely be manual and therefore inefficient and expensive.
- There are significant prospectus disclosure issues to be resolved.

### **Benefits**

- We will begin immediate progress toward solving the operational issues associated with this project.
- We will be able to test the impact on sales in the 2nd quarter.

## REQUEST EXEMPTIVE ORDER FROM SEC AND NASD

### Factors to Consider

- An exemptive order would not eliminate all the operational issues.
- The process of researching precedent, presenting a compelling argument and obtaining a ruling could easily take 60-90 days.
- We will be approaching the <sup>SEC</sup>NASD on a number of issues relating to Virtual Bank, and this may unduly jeopardize our credibility on other issues.

### Benefits

- We may be successful in obtaining an exemptive order, in which case some of the operational aspects of going to scale with this service would be resolved.

## **• PURSUE OTHER PAYMENT PROCESSING IDEAS**

- 1. A BANK ENTITY OF AMERICAN EXPRESS MAY HAVE AN EXEMPTION FROM BD REGISTRATION WHICH WOULD ENABLE IT TO ACT AS THE PAYMENT CONDUIT.**

### **Benefits:**

It may be easier for TRS to operationalize and meet regulatory requirements through AEDC or Centurion than through AESC.

- 2. A THIRD PARTY VENDOR COULD BE CONTRACTED TO PROVIDE PAYMENT PROCESSING WHICH WOULD NOT IMPACT TRS PROCESS, BUT WOULD STILL MEET WITH REGULATORY ISSUES.**

### **Benefits:**

There would be no significant impact on TRS remittance processing.

- 3. FOR TEST PURPOSES, A COMPLETELY INDEPENDENT OPERATION COULD BE ESTABLISHED, UTILIZING AEFA PAYMENT PROCESSING.**

### **Benefits:**

There would be no significant impact on TRS remittance processing and it could operate within current regulatory requirements.

# **EXHIBIT D**

1996

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**PROJECT APPROACH**

A cross-organizational team made up of key business leaders for each of the deliverables stated in the plan will manage this project.

*Project team roles and responsibilities:*

Role/Name	Responsibilities	Time Commitment
Project Sponsor: Brian Kleinberg	<ul style="list-style-type: none"> <li>Support project leader</li> <li>Champion project across organization and with senior leadership</li> <li>Ensure appropriate resources (people and budget) are available.</li> <li>Maintains and clarifies strategic direction.</li> <li>Approves goals and measures.</li> </ul>	
Project Owner: Nancy Jones	<ul style="list-style-type: none"> <li>Sets high-level project direction.</li> <li>Directly supports project leader.</li> <li>Facilitates communication to broader organization and to project sponsor.</li> <li>Reviews status and project priorities.</li> <li>Shares accountability with project leader for key deliverables.</li> <li>Acts as strong advocate for project throughout organization.</li> </ul>	
Project Leader Joel Allen (interim) Susanne Crane <i>(Signature: Susanne Crane)</i>	<ul style="list-style-type: none"> <li>Accountable for overall success of project.</li> <li>Project planning.</li> <li>Project communications to core team, stakeholders, owner, sponsor, and others as needed.</li> <li>Ensures linkage with appropriate areas</li> <li>Manages scope of project.</li> <li>Identifies, addresses and resolves business issues and decisions.</li> <li>Leads and provides work direction to core team on a daily basis.</li> </ul>	
Core Team Members: Additional responsibilities specific to the team member's expertise will be listed with his or her name.	<ul style="list-style-type: none"> <li>Represent respective business area</li> <li>Completion of tasks agreed to in project plan</li> <li>Identifies and resolves issues</li> <li>Time and commitment (team meetings and time to complete specific tasks)</li> <li>Accountable for reporting status of efforts to project leader</li> <li>Accountable for success of project implementation.</li> </ul>	



Core Team Member:	Responsibilities	
Legal Rockell Metcalf <i>Shirley Beck</i>	<ul style="list-style-type: none"> <li>Provides legal counsel</li> <li>Leads effort to achieve SEC/other regulatory approval</li> <li>Identifies and resolves legal issues</li> <li>Provides exact guidelines for development of capability</li> </ul>	
FD Marketing/ PASA Anne Bertelsen	<ul style="list-style-type: none"> <li>Develops appropriate marketing plans for test market</li> <li>Provides business requirements to meet marketing needs</li> <li>Implements marketing plan</li> <li>Participates in definition of requirements and evaluation of test market</li> <li>Coordinates with other marketing efforts</li> </ul>	
FD Marketing/ Funds Ed Hrybenko	<ul style="list-style-type: none"> <li>Develops appropriate marketing plans for test market</li> <li>Provides business requirements to meet marketing needs</li> <li>Implements marketing plan</li> <li>Participates in definition of requirements and evaluation of test market</li> <li>Coordinates with other marketing efforts</li> </ul>	
Business Project Manager Joan Prairie	<ul style="list-style-type: none"> <li>Develops project plan</li> <li>Manages scope and change control</li> <li>Ensures business requirements are complete and clearly understood.</li> <li>Coordinates technology and services aspects of project.</li> </ul>	
CSO Marcus Sheire	<ul style="list-style-type: none"> <li>Scope out and document issues relating to CSO operational activities for the Investing on the Card market test.</li> <li>Provide project lead and project team with updates of CSO operational issues.</li> <li>Raise known issues relating to other areas of the company outside of the CSO.</li> <li>Leads development of service related components including staffing, training, process flow, etc.</li> </ul>	
Technology Leader Patrick Reineke	<ul style="list-style-type: none"> <li>Ensures technology is in place to support a successful test.</li> <li>Ensures prioritization within technologies and manage technology resources.</li> <li>Leads resolution of technology issues.</li> </ul>	

FD Technologies Liaison Nik Muzumdar	<ul style="list-style-type: none"> <li>Acts as project liaison to Card Technologies areas.</li> <li>Works with AEFA (AESS &amp; Vantage) Technologies in requirement definition</li> <li>Ensures that business requirements are communicated to Card Technologies.</li> <li>Monitors and reports progress, and helps coordinate work effort between Card and AEFA Technologies.</li> </ul>	
AEFA/Variable Annuities Sarah Mealey	<ul style="list-style-type: none"> <li>Represents product related issues.</li> <li>Ensures Variable Assets systems support for PASA inclusion.</li> </ul>	
Finance	<ul style="list-style-type: none"> <li>Conducts economic analysis.</li> <li>Develops CBA.</li> <li>Develops metrics and tracks results in conjunction with marketing and project leader.</li> </ul>	
Content Expert/ Jeff Hovis	<ul style="list-style-type: none"> <li>Reviews business model, systems designs, money flow models.</li> <li>Identifies issues and makes recommendations for resolution.</li> </ul>	
CCSG NPD	<ul style="list-style-type: none"> <li>Identifies relevant linkages to CCSG.</li> <li>Coordinates efforts with CCSG.</li> </ul>	

#### Key Stakeholders:

- Sue Skalicky
- Cindy Carlson
- Leslie Bodell
- Rich Sykes
- John Sweeney
- Al Treece
- Sandy Deming

*John Cattan*  
*Parr*

#### Project decision controls:

- Project Sponsor approves strategic direction.
- Project Owner approves budget, resources, and proposed business model.
- Major changes to project must be approved by project sponsor or project owner.
- Project Leader runs the project as the decision-maker once implementation plan is approved and brings unresolved issues to the Project Owner.

#### ESTIMATED COST

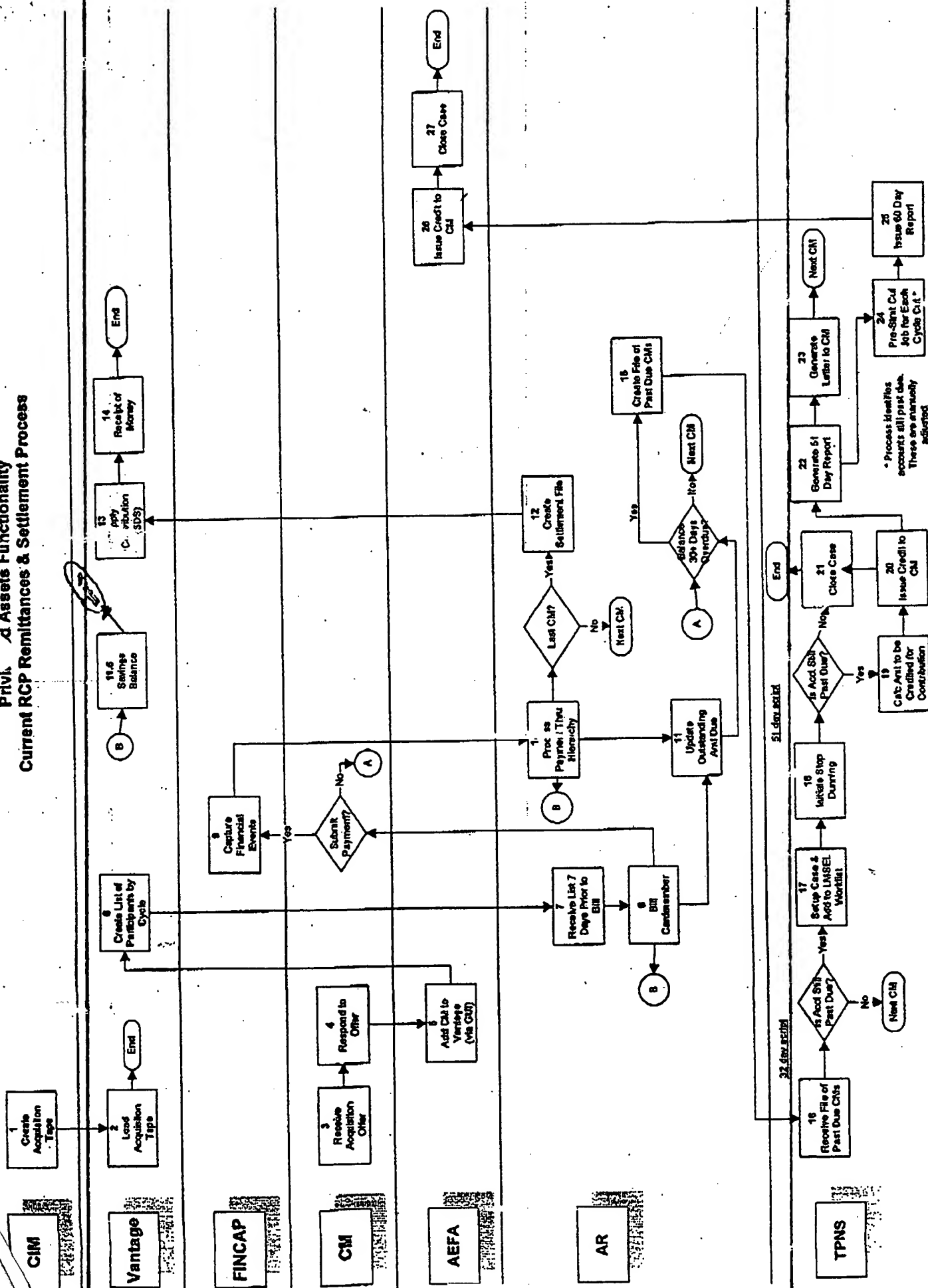
Estimate of \$500,000. Cost will be re-estimated when the PDR is complete.

#### RISKS

- The SEC may not give approval on either issue they will address.
- Once the case is presented, the timing of the SEC ruling is not controlable.

# **EXHIBIT E**

## Private Assets Functionality



# **EXHIBIT F**



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## Investing on the Card

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December 15, 1997

VB-34

## Agenda

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*Earlier this year, AEFD -- in partnership with TRS and AEFA technologies -- launched an initiative to facilitate purchasing securities with the Amex Card.*

*The purpose of our meeting today is to share Investing on the Card objectives and progress.*

*For our discussion, we will cover:*

- Regulatory background
- Initiative Objectives and Scope
- Operational Overview
- Next steps

## Background

---

*Historically, regulatory restrictions have prevented Amex from developing the capability to offer cardmembers the opportunity to purchase securities with their card. Specifically, Amex -- like most other card issuers -- was hindered by several regulatory constraints:*

- Prohibition against non-registered companies both offering security products or accepting funds for securities
- Prohibition against utilizing loaned monies to purchase securities
- Requirement to provide next computed price after receipt of order
- Regulation Z which gives cardmembers right to assert claims against card issuers for faulty products and/or services



## **Background cont.**

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*Last year, two new regulatory developments opened the way for Amex to re-assess the feasibility of offering card billing*

- The Federal Reserve Board ruled that broker-dealers could allow customers to purchase securities on credit
- The Securities and Exchange Commission hinted that they would re-evaluate their stance in light of the Federal Reserve Board's ruling -- if an acceptable process could be proposed

## Initiative Objective and Scope

---

*With cautious confidence that the SEC would grant us permission to proceed, AEFD initiated Investing on the Card with the following objective and scope:*

- Objective: Build functionality to allow cardmembers to make security purchases on their American Express Card
  - ⑥ – Initially replicating direct debit dollar cost averaging capabilities
- Scope: Card billing feature will be built for all current and potential AEFD financial products -- mutual funds, annuities, equities, certificates, bonds, proprietary and non-proprietary, load and no-load, etc.
- Initially, the functionality will be limited to charge cardmembers
  - 9MM consumer customers including 300,000 Platinum and over 1MM membership reward enrollees
  - 1.5MM SBS customers
- Lending Products will be incorporated with the release of Triumph functionality in 1999

# Requirements

*To realize our vision for Investing on the Card, the following milestones are critical*

- Favorable ruling from the SEC that permits TRS to provide card billing for security purchases
- Technological changes to both TRS and AEFA systems
  - Fairly minor changes to TRS' Legacy System but significant for Triumph
    - > Legacy: Create new SE codes for each product
    - > Triumph: Changes to payment hierarchy and credit/dunning processes
  - Programming and linkage changes to AEFA systems
    - > New routines need to be written -- e.g., enlisting in funds/products, allocation instructions, execution orders (see Appendix B for process map)
    - > Linkages are required between annuity and brokerage product systems
    - > Card billing, remittance and reconciliation processes need to be modified
- Identification and/or development of appropriate marketing opportunities for leveraging Investing on the Card functionality
  - Historical performance indicates 50% response rate lift due to card billing functionality

*Note*



## **Progress To-date**

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*AEFD Legal and Technologies have taken the lead in preparing the regulatory and technology solutions to enable card billing functionality 2Q98.*

- Legal request for SEC will be ready by late next week
- Technologies has conducted a high level assessment
  - More formal business requirement definition and sizing to be completed in February
  - Development to begin in March
- High Level Business Case to prioritize and resource initiative to be completed this week

*Now, AEFD Marketing needs to begin identifying products and positioning to leverage this capability*

- Possible opportunities include IRA, PASA and trading lines
- Positioning should leverage convenience, flexibility discipline and no pre-set spending limit

# Operational Overview

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## *Initially, Investing on the Card processes will mimic those currently utilized by Privileged Assets*

- Customers enroll in Privileged Assets, indicating on their application their annuity contribution commitment
  - Contributions are voluntary and appear on the cardmember's statement -- monthly, quarterly or annually -- depending upon their preference
  - Because contributions are voluntary, non-payments cannot trigger dunning process, impact credit rating or open to buy
- When payment is received, AEFA is notified and process for same day settlement is initiated (see Appendix A for detailed process map)
  - Non-payments exceeding 60 days are dropped from the statementing process
- AEFA receives funds via electronic wire transfer from TRS no later than 48 hours after payment

need to for 24 hrs.  
try for

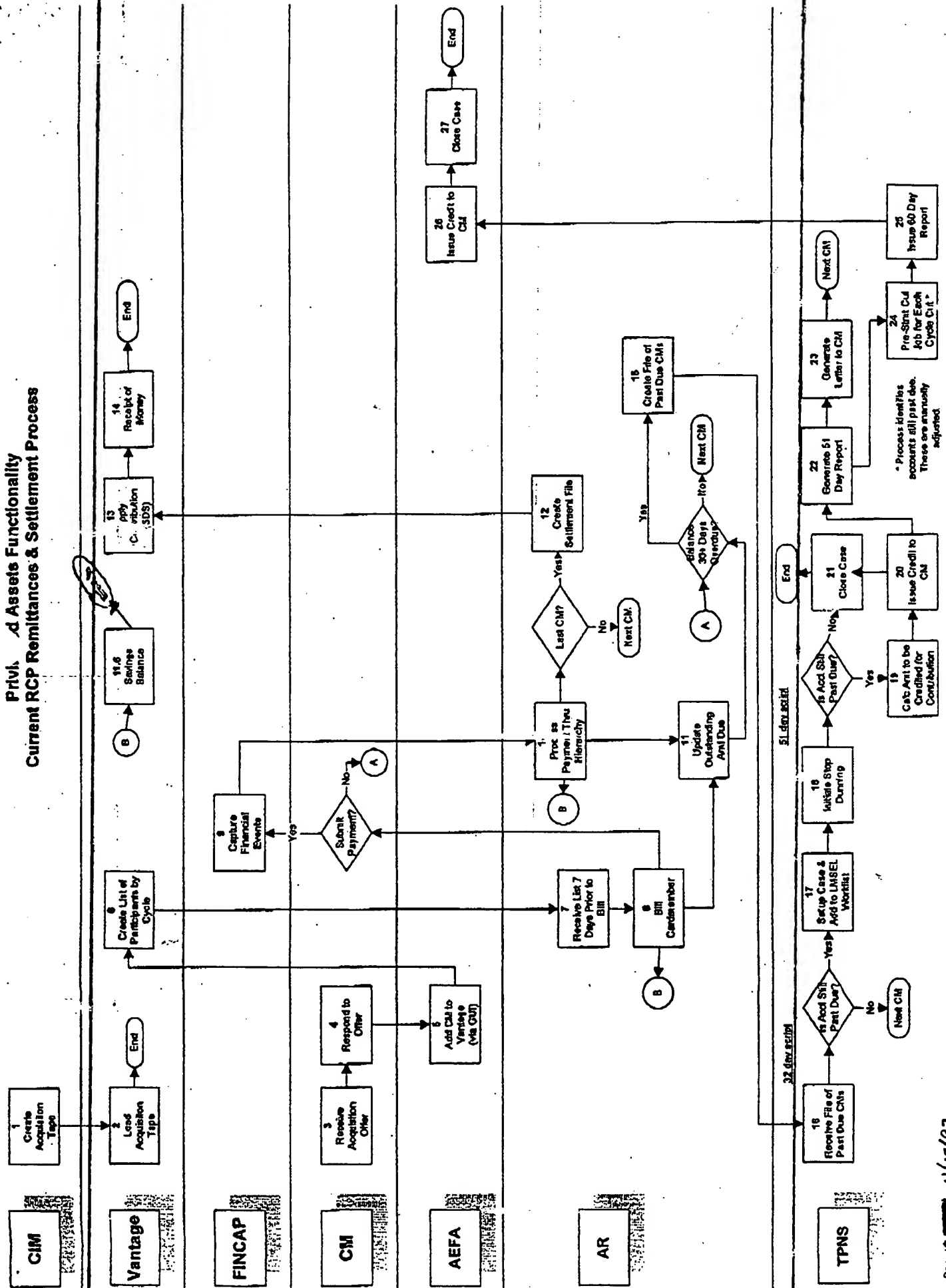
## Next Steps

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*We are moving rapidly toward our goal.*

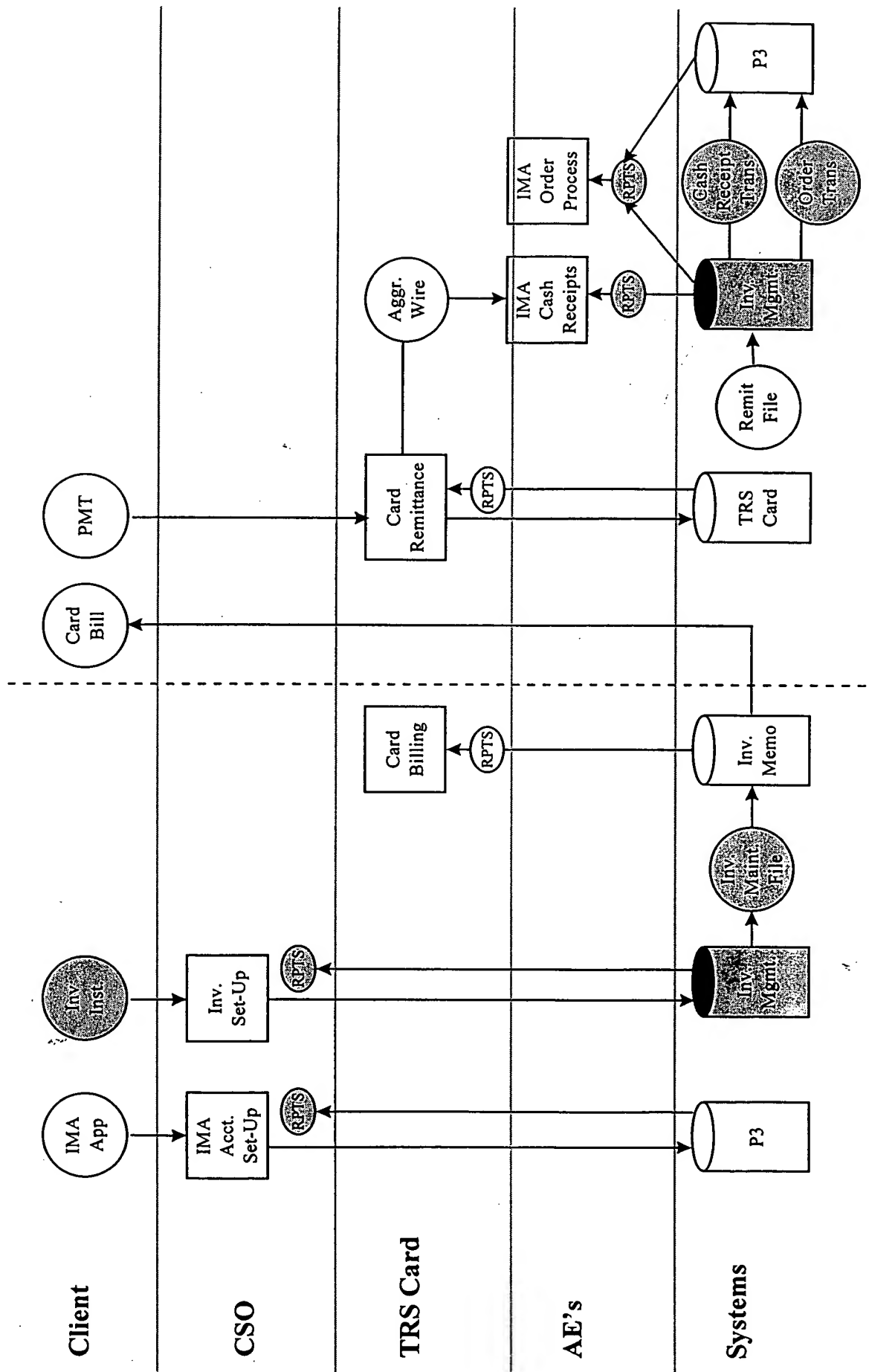
<u>Task</u>	<u>Date</u>
High Level Business Case written and submitted	1/20
* Legal Issues resolved and proposal submitted *	2/1
SEC Response	late Feb
Business requirements defined	Early Feb
Programming begins	March
Test	Early May
Full Functionality	June

# Private Assets Functionality Current RCP Remittances & Settlement Process



Rev. 10: 11/17/97

# Appendix B

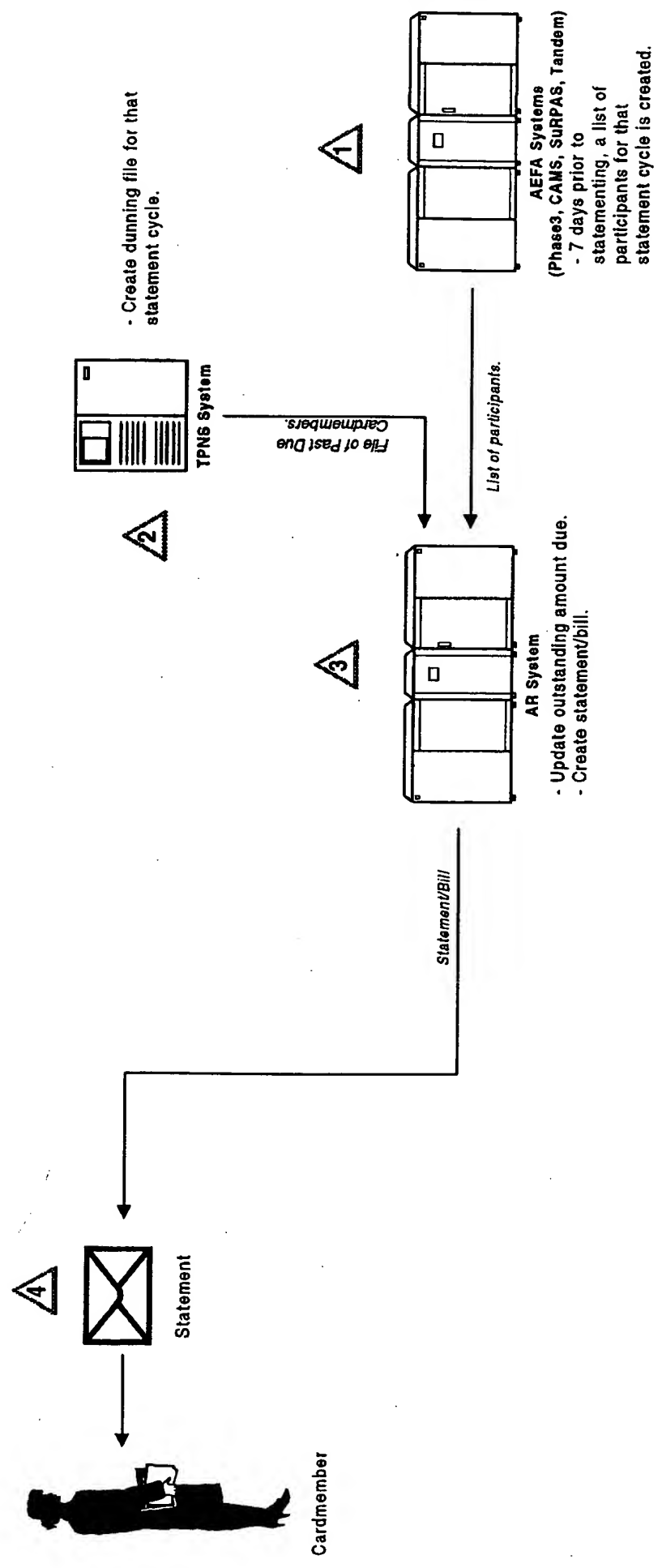




# **EXHIBIT G**

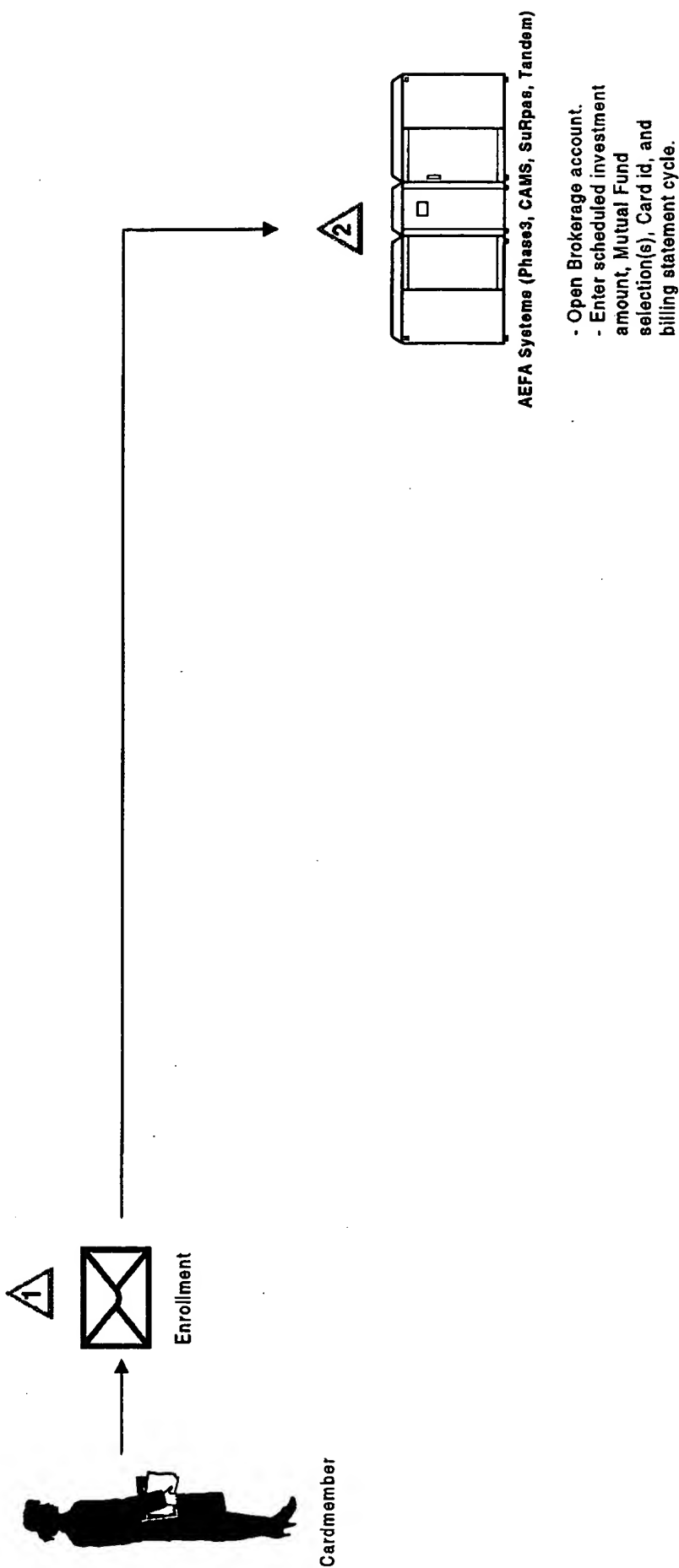
VB-34

# INVESTING ON THE CARD Billing - Data Flow



TRS AEFA

# INVESTING ON THE CARD Account Setup - Data Flow



# **EXHIBIT H**



Financial  
Direct

VB-34

## Memorandum

Date: May 11, 1998 City: New York  
From: Brian Kleinberg *BK* Office: FD Executive  
Subject: INVESTING ON THE CARD  
To: Rockell Metcalf  
cc: John Cattau Colleen Curran  
Sally Cooper Nancy Jones

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I spoke to David House and Kerry Hatch from S/E and obtained their agreement that for the SEC approval process, we can state that we will not pay a discount rate for IOC. We need to follow-up with S/E (Kerry's group) to ensure that we determine fair pricing, methodology and operational feasibility for implementation.

Please let me know if there is anything else required on this topic.

# **EXHIBIT I**



VB-34

## Memorandum

Date: June 10, 1998 City: New York  
From: Brian Kleinberg *B* Office: Financial Direct Executive  
Subject: INVESTING ON THE CARD  
To: Phillip Riese  
cc: Colleen Curran Rockell Metcalf

The attached requires your immediate attention.

We are proceeding with the process to obtain SEC approval for allowing TRS and AEFA to implement Investing on the Card. The attached letter is scheduled to be sent this Friday, therefore your review and any comments are necessary by Thursday. Please forward them to either Rockell Metcalf (General Counsel in NY) or myself.

This document has been reviewed and approved by attorneys throughout Amex.

Please pay particular attention to sections:

- I Introduction
- II The Payment Process
- III Limitation on the Activities of TRS

Within Section II, the last paragraph responds to the SEC's historical concerns about unregistered entities (like TRS) handling mutual fund monies. It provides that TRS will assume full responsibility for the safety of the Cardmember's mutual fund monies while the monies are within TRS's control (e.g., TRS will make good on the funds in the unlikely event they are misplaced or lost during the transfer process from TRS to AEFA). Of course, this guarantee of safety will not have a significant economic impact on TRS and it will not apply once the mutual fund monies have been transferred to AEFA for investment.

Thank you for your prompt attention.

[Date]

Ms. Catherine McGuire  
SEC Chief Counsel  
Division of Market Regulation  
Securities and Exchange Commission  
SEC Stop 7-10  
450 5<sup>th</sup> Street, N.W.  
Washington, D.C. 20549

Mr. Douglas J. Scheidt  
SEC Chief Counsel  
Division of Investment Management  
Securities and Exchange Commission  
SEC Stop 9-5  
450 5<sup>th</sup> Street, N.W.  
Washington, D.C., 20549

Dear Ms. McGuire and Mr. Scheidt:

We are submitting this letter on behalf of American Express Travel Related Services Company, Inc. (TRS) to obtain assurances that the staff of the Securities and Exchange Commission (Commission) would not recommend enforcement action to the Commission if TRS establishes and operates a bill processing arrangement for American Express customers (Cardmembers) in the manner described below. Specifically, TRS requests the assurances of the Division of Investment Management that this arrangement does not violate the pricing provisions of Rule 22c-1 under the Investment Company Act of 1940 (1940 Act). Moreover, TRS seeks the assurances of the Division of Market Regulation that it would not recommend enforcement action if TRS proceeds in the manner described below and does not register as a "broker" or "dealer" under Section 15(a) of the Securities Exchange Act of 1934 (Exchange Act).

## I. Introduction

TRS offers individual consumers a variety of products and services, including charge cards such as the American Express® Card, the American Express® Gold Card and the Platinum Card® (collectively, Charge Cards)<sup>1</sup>. Charge Cards are primarily designed as a method of payment or a bill paying mechanism and not as a means of financing purchases of goods or services. Specifically, Charge Cards do not involve

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<sup>1</sup> TRS offers its Charge Cards through its wholly-owned subsidiary, American Express Centurion Bank, a Utah-chartered FDIC-insured financial institution.

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 [Date]  
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an extension of credit by TRS to Cardmembers.<sup>2</sup> Moreover, Charge Cards require the Cardmember to pay the full amount billed each month, and do not contemplate the accrual of finance charges. The program described herein will not be offered by TRS in connection with any of its revolving credit card products.

TRS is a wholly-owned subsidiary of American Express Company. TRS initially plans to make its proposed bill paying service available to Cardmembers with respect to the investments they make in mutual funds and variable annuity products distributed by American Express Service Corporation, a wholly-owned subsidiary of TRS (AESC). AESC is a registered broker-dealer under the Exchange Act and a member of the National Association of Securities Dealers, Inc. AESC distributes various investment products such as no load mutual funds and variable annuities. In addition, investors may open a brokerage account with AESC. TRS plans to make its bill paying services available to Cardmembers in connection with such brokerage accounts as well. Typically, such accounts would serve as a vehicle for subsequent investment into one of the specific investment products noted.

TRS proposes to enter into an arrangement with AESC and individual Cardmembers, so that Cardmembers can use the Card to make periodic purchases of mutual fund shares or variable annuity products directly, or indirectly, through direction of those amounts to a brokerage account. This proposal is in direct response to numerous requests from Cardmembers who desire a more convenient mechanism to pay for investment products.<sup>3</sup>

Under the proposed arrangement, a Cardmember will send a single check, payable to TRS, for both regular Charge Card purchases and for the purchase of mutual fund shares. TRS will in turn promptly forward the payment for mutual fund shares to AESC and investors will receive the price on their mutual fund shares which is next computed after receipt of the order by AESC. TRS intends to enter into similar bill processing arrangements with other affiliated and non-affiliated third party broker-dealers and is requesting no-action relief with respect to any such arrangements as well.

<sup>2</sup> In contrast, the Division of Market Regulation recently addressed and granted an order of exemption in connection with the extension of credit to purchase shares of a business development company over the Internet. See Technology Funding Securities Corporation, May 20, 1998. Because TRS' proposal only involves Charge Cards, it does not implicate the Exchange Act issues addressed in that exemption.

<sup>3</sup> For over eight years, Cardmembers have used regular Card billing for contributions to the fixed annuity products offered by AESC. Many of these Cardmembers have requested that variable investments be made available via this flexible, convenient method of payment.

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[Date]  
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## **II. The Payment Process**

Prior to the commencement of the bill paying service with respect to a Cardmember's account, he or she will notify AESC of the amount the Cardmember intends to invest on a monthly basis, the specific funds or variable annuity selections the Cardmember would like to contribute to, and the allocation of investment amounts to each investment. The Cardmember may make withdrawals and changes to his or her brokerage account or terminate participation in the service by calling a toll free number administered and serviced by AESC.

The Cardmember's intended investment amount will be reflected on his/her American Express Card billing statement as a reminder to remit such amount—monthly or quarterly depending on the Cardmember's preference. Since each investment is voluntary, non-payment will not affect the Cardmember's ability to charge on the Card, and unpaid investment amounts will not accrue interest or other charges.

The Cardmember will send a single check in payment of his/her regular Charge Card bill along with the specified investment amount to a TRS processing center in one of several states.<sup>4</sup> TRS, acting only as a conduit, will immediately enter the payment into its payment remit system. Payments received prior to a 2:00 p.m. cutoff will be processed through TRS's payment processing systems and promptly forwarded to AESC. Investors will then receive the price next computed after receipt of the order by AESC.

During the transfer process of investment monies from TRS to AESC, there will be no risk of loss to investors. From the time the intended investment amount is received by TRS until the time of investment, TRS will assume full responsibility for the safety of the Cardmember's intended investment amount.

## **III. Limitations on the Activities of TRS**

TRS will act only in the capacity of a bill processor, which collects and promptly forwards the intended investment amount to AESC at the direction of the Cardmember.

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<sup>4</sup> Although the mailroom and remittance functions of all but one of these processing centers have been outsourced to third parties, such outsourcing does not affect the responsibility of TRS to the customer.

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1. **Limitations on Marketing.** Neither TRS nor its employees or any non-broker-dealer registered affiliates will market the availability of this administrative service or the underlying products and services offered by AESC.
2. **Limitations on Activities of Processing Center Employees.** No TRS employees or non-broker-dealer registered affiliates at TRS processing centers will be involved in effecting transactions in securities. Instead, their tasks will be restricted to opening envelopes and entering the intended investment amount into TRS's payment processing system.
3. **Limitations on Activities of TRS Customer Service Associates.** No TRS Customer Service Associates will be permitted to recommend, endorse, respond to questions or otherwise discuss matters involving brokerage accounts, mutual funds or related securities transactions. Rather, TRS Customer Service Associates will be trained to direct all securities related inquiries to a (1-800) Client Service number at AESC. In addition, an AESC (1-800) Client Service number will appear on the Cardmembers' Charge Card statement for any service issues pertaining to their investments.
4. **Limitations on Credit.** TRS will not extend credit to any Cardmember for the purpose of purchasing securities through, or carrying securities with AESC.
5. **Limitations on Compensation.** TRS will not receive a referral fee of any kind from AESC nor will it receive any compensation that is based upon the total dollar amount invested by a Cardmember. Rather, TRS will charge a fee that will offset the expenses it incurs as a result of this service, together with a reasonable profit.

#### IV. Activities of AESC

Under the proposed arrangement, AESC will have exclusive responsibility for the following activities:

1. **Marketing.** Marketing materials describing the availability of TRS's bill processing service, the timing on pricing of mutual funds, and the underlying products and services offered by AESC will be distributed exclusively by AESC. AESC will review and be fully responsible for the content of all marketing materials, advertising and other informational materials regarding the service. Any such materials will clearly indicate that TRS is not a registered broker-dealer, that all investment related inquiries should be directed exclusively to AESC, that TRS is a separate entity from AESC, and that mutual funds are being offered through AESC and not TRS.

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2. **Securities Related Activities.** AESC will have responsibility for all securities related activities including, complying with all regulatory requirements, the opening of accounts, the entering of orders and the execution of transactions, setting up and maintaining customer files, and distributing order confirmations and statements after each payment is processed.
3. **Securities Related Questions and Servicing.** AESC will have responsibility for responding to all securities related questions and service issues through its (1-800) Client Service number.

#### V. Analysis of the Rule 22c-1 Pricing Issue

Under Section 22(c) of the 1940 Act and Rule 22c-1 thereunder, mutual fund shares must be priced based upon the net asset value next calculated after an order is received. The proposed arrangement will comply with Rule 22c-1 because the *receipt* of the order for purchase of mutual fund shares, within the meaning of Rule 22c-1, occurs at the time AESC receives the order.

Rule 22c-1 extends its stated pricing requirements only to registered investment companies, persons designated in an issuer's prospectus as authorized to sell or redeem a company's shares, or principal underwriters or dealers of such shares. Under the proposed bill processing arrangement, TRS will not act in any of the foregoing capacities. Rather, TRS will act as a bill processing agent at the direction of the Cardmembers. TRS will not be designated as AESC's agent in a fund prospectus or otherwise, nor has it been delegated any function in connection with AESC's mutual fund operation. Instead, TRS has designed a service that is intended to streamline bill paying for its customers.

The staff has agreed in certain other situations involving an investor, a "payment processing agent" and a mutual fund company that the pricing provisions of Rule 22c-1 would be triggered by receipt of an order by the mutual fund company or its designated bank, and not at the "payment processing agent" step. See, e.g., Patrick P. Badamy, M.D., SEC No-Action Letter, LEXIS 1495 (pub. avail. Apr. 7, 1972); Consolidated Programs, Inc., SEC No-Action Letter, LEXIS 1771 (pub. avail. Mar. 22, 1973). In the Badamy letter, the staff recognized that a custodian or trustee under a Keogh Plan does not function as a dealer, underwriter, or fund designee as set forth in Rule 22c-1, but instead as the mutual fund purchaser's agent. As a result, Rule 22c-1 would apply at the fund, underwriter or fund designee level. Similarly, in the Consolidated Programs letter (CPI), the staff issued assurances with respect to CPI's proposal to act as agent for individual mutual fund purchasers, receiving their payments for fund share purchases through a computerized billing system and forwarding them to the fund's designated bank. Under CPI's proposal,

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customers would receive the fund share price next computed after receipt by the fund's bank.

The facts presented in CPI bear a strong resemblance to the bill processing arrangement proposed by TRS. Like CPI, TRS proposes to institute a bill processing service to provide enhanced convenience to mutual fund purchasers. While TRS's proposed service will be launched with respect to AESC and its investment products, the service may in the future be expanded to allow Cardmembers to direct investments to the products of other fund groups. Although in its letter CPI noted that it was not affiliated with any mutual fund advisor or custodian, we do not believe the fact that TRS is affiliated with AESC should alter the staff's conclusion. In Badamy, the staff specifically addressed the fact that payment processing agents would be recommended by a fund and determined that such a recommendation would not change the analysis. Like the investor agents in that case, TRS will be acting solely as an agent of the purchaser, despite its affiliation with AESC; as a result, TRS should not be subject to the timing requirements of Rule 22c-1.

Our position is consistent with the policies underlying Rule 22c-1. In the Release adopting the rule, the Commission made clear that one of its most important purposes was to address the speculative practices which could result from backward pricing. Specifically, the Commission expressed its concern that the purchase or sale of fund shares at a price based upon a previously determined net asset value could permit a speculator to take advantage of fluctuations in the prices of the fund's underlying securities that occurred after the fund last calculated its net asset value.<sup>5</sup> The proposed program is fully consistent with this aim, as purchases of fund shares will be effected at the next computed price upon receipt of the order by AESC. There is no opportunity in the process for speculation by investors. To participate in the proposed program, investors will choose the convenience of purchasing mutual funds and paying Charge Card balances by writing a single check to TRS. Because the marketing materials prepared and distributed by AESC will fully disclose the mechanics of this arrangement, Cardmembers will be informed that pricing of their mutual fund purchases will occur when their order is received by AESC and not when payment is received by TRS.

#### **VI. Analysis of the Broker-Dealer Registration Issue**

Because of the limited scope and nature of TRS's activities as a bill processing agent, we submit that neither TRS nor any of its employees or affiliates (other than AESC) are required to register with the Commission as broker-dealers under Section 15(b) of the Exchange Act in connection with this proposal.

<sup>5</sup> Investment Company Act Release No. 5519, October 19, 1968.

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Section 3(a)(4) of the Exchange Act defines a "broker" as any person, other than a bank, "engaged in the business of effecting transactions in securities for the account of others." Section 3(a)(5) of the Exchange Act defines a "dealer" as any person, other than a bank, "engaged in the business of buying and selling securities for his own account, through a broker or otherwise". Section 15(a) of the Exchange Act provides that "it shall be unlawful for any broker or dealer to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security, unless the broker or dealer is registered in accordance with Section 15(b)." (emphasis added)

Both the Commission staff and the NASD have long concluded that an entity or person is not "effecting transactions" or inappropriately dabbling in securities if it is merely carrying out a clerical or ministerial function. See Aetna Casualty and Surety Company, 1988 SEC No-Action Letter, LEXIS 386 (pub. avail. Dec. 21, 1987); Chubb Securities Corporation, 1993 SEC No-Action Letter, LEXIS 1204 (pub. avail. Nov. 24, 1993); Applied Financial Systems, 1971 SEC No-Action Letter, LEXIS 4075 (pub. avail. Sept. 25, 1971); Dreyfus Group Equity Fund, 1971 SEC No-Action Letter, LEXIS 1000 (pub. avail. Jun. 26, 1971). See also Exchange Act section 3(a)(18) (defining the term associated person of a broker or dealer to exclude those persons who perform purely clerical or ministerial acts); NASD By-Laws, Persons Exempt from Registration, Rule 1060(a)(1) (providing that "persons associated with a member are not required to be registered if their functions are solely and exclusively clerical or ministerial").

TRS's activities as a mere bill processing agent clearly fall within the activities which the staff has previously held to be purely clerical or ministerial in nature. The only function of TRS with respect to the securities business is to collect and promptly transfer periodic investment amounts to AESC in the interest of convenience and at the direction of the Cardmember.

As described above, AESC, a registered broker-dealer, will be responsible for all marketing activities related to TRS's proposed bill processing arrangement as well as for the underlying products and services offered by AESC. TRS will not advertise its role as a bill processor of Cardmembers' investment payments to AESC. AESC will have exclusive responsibility for the opening of accounts, the entering of orders, the execution of transactions, transferring investment monies to the appropriate mutual fund companies, and distributing account confirmations and statements. TRS will engage in none of these securities-related activities. Rather, TRS will restrict its activities to the ministerial tasks of opening envelopes, entering the intended investment amount into TRS's payment processing system and promptly forwarding such payment to AESC. AESC is responsible for responding to all Cardmembers' securities-related questions and service issues. TRS employees and unregistered affiliates will be strictly prohibited from recommending, endorsing,

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responding to questions or engaging in any negotiations involving brokerage accounts or related securities transactions.

In light of the limited nature of TRS's role as a bill processing agent, engaged in exclusively clerical and ministerial functions and AESC's role as the registered broker-dealer, responsible for all marketing and securities related activities, TRS should not be required to register as a broker-dealer. While several SEC no-action letters lend strong support to our conclusion, the Aetna Casualty and Surety no-action letter, supra, is particularly applicable because it involved a bill processing arrangement similar to the one proposed by TRS.

Just as TRS is seeking to extend the Charge Cards' use as a bill paying mechanism to include payments for mutual funds, Aetna, an insurance corporation, sought to extend its authorized check plan (the Aetna Service Account) to include payments for variable life insurance policies, a securities product like the mutual funds in this case. Aetna's proposal allowed customers, who had more than one insurance and variable life insurance policy to send a single monthly payment to Aetna, an entity not registered as a broker-dealer. Aetna, in turn, would process and allocate premiums on variable life insurance policies as well as on casualty and property insurance. The staff granted Aetna's no-action request concluding that Aetna, as a mere conduit of funds, was only engaged in clerical and ministerial activities.

The same rationale should apply with equal force to TRS's proposal. TRS, like Aetna, has effectively limited its role to that of a conduit which collects and promptly transfers investment monies to a registered broker-dealer. The TRS proposal, like the Aetna proposal, protects investors from risk of loss inherent in any breakdown during the transfer process. In addition, the regulatory requirements and responsibilities imposed on AESC as a registered broker-dealer and the contractual restraints and strict limitations imposed on TRS as a bill processing agent so greatly minimize any risk to the public that no purpose would be served by subjecting TRS to the regulatory authority of the Commission. Therefore, the staff's conclusion that Aetna would not have to register as a broker-dealer applies directly to TRS.<sup>6</sup>

On several other occasions, the staff has agreed that broker-dealer registration is unwarranted when entities and/or persons perform clerical and ministerial services similar to the kind of bill processing service proposed by TRS. See Carlos M. Urrutia, 1980 SEC No-Action Letter, LEXIS 3729 (pub. avail. Sept. 26, 1980).

<sup>6</sup> This result is not affected by the fact that investors will send a check payable to TRS that will include payment for mutual funds because TRS, as a mere conduit, will not have control of investment monies. See Aetna No Action Letter, supra, where the staff agreed that "no control of customer's funds by Aetna exists, even if Aetna has momentary possession of these funds...because Aetna handles the funds only pursuant to customers' directions to transfer them...."

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(taking and transmitting orders for securities, determined to be a clerical and ministerial service); Dreyfus Group Equity Fund, SEC No-Action Letter, Lexis 1000 (pub. avail. Jun. 26, 1971) (maintaining shareholder records, processing investments and redemptions of mutual fund shares, data processing, and mailing shareholder information determined to be clerical and ministerial services). Like the entities involved in the foregoing no-action letters, TRS, as a bill processing agent, will perform a purely clerical and ministerial task and therefore will not effect securities transactions or otherwise engage in securities-related activities.

Historically, the staff has indicated a concern when non-registered entities become entangled in marketing activities<sup>7</sup> or enter into compensation arrangements based on securities transactions.<sup>8</sup> TRS has responded to the staff's historical concerns by ensuring that none of its activities involve, or even approach, the functions that are the hallmark of broker-dealer activity. TRS will not engage in any marketing activities related to its proposed bill processing arrangement or the underlying securities products that can be purchased through the service. As a result, the staff should conclude that TRS is not required to register as a broker-dealer for engaging in limited bill processing activities for AESC at the direction of Cardmembers.

## IX. Conclusion

On the basis of the foregoing, we submit that TRS's role is not as an underwriter, dealer or other person designated by a fund to consummate transactions in its shares, but as the mutual fund purchaser's agent in the payment process. As such, the pricing requirements of Rule 22c-1 should not be triggered upon receipt of the payment by TRS, but at the point the order reaches AESC.

We further submit that since TRS's role is restricted to the ministerial task of collecting the intended investment and promptly remitting it to AESC in the interest of convenience and at the direction of the Cardmember, TRS should not be required to register as a broker-dealer under Section 15(b) of the Exchange Act.

<sup>7</sup> See Lincoln Financial Advisors Corporation, SEC No-Action Letter, Lexis 303 (1998) (the staff refused to take a no-action position where Lincoln sought to enter into arrangements with certain insurance companies and their affiliated agencies through which insurers and agencies would become actively and intimately involved in selling mutual funds).

<sup>8</sup> See George J. Baylor, SEC No-Action Letter, 1971 SEC No-Action Letter, Lexis 3245 (Sept. 5, 1971) (the staff issued a negative response to a proposal to establish a restaurant containing telephone lines to brokerage houses, where the restaurant would receive a transaction-based payment from those brokerage houses).



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Mr. Douglas J. Scheidt  
[Date]  
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If the staff believes it would be useful, we would be happy to discuss the foregoing with you and/or your staff at the Commission offices at your convenience. In any event, if the staff is inclined to issue a negative response to either of the foregoing requests based upon the facts specified above, we would appreciate the opportunity to discuss the matter with you. If you have any questions, please feel free to contact me at (612) 671-8626.

Sincerely,

Colleen Curran, Esq.

# 108241

P. 11/11

FAX NO. 212 819 8942

JUN-09-98 TUE 11:11 AM YING

# **EXHIBIT J**



# Investing on the Card Market Test

**CONFIDENTIAL**

June 22, 1998

# **EXHIBIT K**

VB-34

From: Colleen Curran @ IDS on 07/01/98 04:53 PM CDT

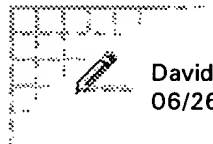
To: David Hubers @ IDS

cc: Rockell Metcalf, Sheri Beck @ IDS

Subject: Re: Investing on the Card 

I talked to Craig Tyle and Amy Lancellotta at the ICI. Amy is drafting a short position paper to be distributed to you and the rest of the Executive Committee very soon. I sent her a copy of our no-action request on a confidential basis. The ICI position is that we shouldn't allow mutual funds to be purchased on credit because that could fuel today's market with speculative transactions by consumers who haven't experienced a market correction/crash. In the letter, the ICI will distinguish the charge card situation from the credit card situation. I will be out of the office the week after the Fourth. If you receive the ICI letter during that week, please forward it to Rockell and Sheri. I'm confident they will work with the ICI to make any necessary changes to support our position and they'll call me up north if there are any concerns.

David Hubers



David Hubers  
06/26/98 11:24 AM

To: Colleen Curran

cc:

Subject: Re: Investing on the Card 

(Note from Sandy) Colleen -- FYI Dave is on vacation starting today and I won't be talking to him for a few days. I'll leave it up to you on whether or not you call Craig today, but I don't think he would mind.

# **EXHIBIT L**



**Financial  
Advisors**

Colleen Curran  
Vice President  
Assistant General Counsel  
Bus: 612 871 8826  
Fax: 612 871 3767

American Express Financial Advisors Inc.  
105 Tower 10  
Minneapolis, Minnesota 55440

September 8, 1998

Ms. Catherine McGuire  
SEC Chief Counsel  
Division of Market Regulation  
Securities and Exchange Commission  
SEC Stop 7-10  
450 5<sup>th</sup> Street, N.W.  
Washington, D.C. 20549

Mr. Douglas J. Scheidt  
SEC Chief Counsel  
Division of Investment Management  
Securities and Exchange Commission  
SEC Stop 9-5  
450 5<sup>th</sup> Street, N.W.  
Washington, D.C., 20549

Dear Ms. McGuire and Mr. Scheidt:

We are submitting this letter on behalf of American Express Travel Related Services Company, Inc. (TRS) to obtain assurances that the staff of the Securities and Exchange Commission (Commission) would not recommend enforcement action to the Commission if TRS establishes and operates a processing arrangement for American Express customers in the manner described below. Specifically, TRS requests the assurances of the Division of Investment Management that this arrangement does not violate the pricing provisions of Rule 226-1 under the Investment Company Act of 1940 (1940 Act). Moreover, TRS seeks the assurances of the Division of Market Regulation that it would not recommend enforcement action if TRS proceeds in the manner described below and does not register as a "broker" or "dealer" under Section 15(a) of the Securities Exchange Act of 1934 (Exchange Act).

#### **I. Introduction**

TRS offers individual customers (Cardmembers) a variety of products and services, including charge cards such as the American Express® Card, the American Express® Gold Card and the Platinum Card® (collectively, Charge Cards).<sup>1</sup>

<sup>1</sup> TRS offers such Charge Cards either directly or indirectly through its wholly-owned subsidiary, American Express Centurion Bank, a Utah-chartered FDIC-insured financial institution.

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Charge Cards are primarily designed as a method of payment or a bill paying mechanism and not as a means of financing purchases of goods or services. Accordingly, this processing arrangement will not involve an extension of credit or an accrual of finance charges.<sup>1</sup> TRS will not make this processing arrangement available with respect to any of its revolving credit card products.

TRS is a wholly-owned subsidiary of American Express Company. TRS plans to make its proposed processing arrangement available to Cardmembers with respect to the investments they make in mutual funds and variable annuity products distributed by American Express Service Corporation, a wholly-owned subsidiary of TRS (AESC). AESC is a registered broker-dealer under the Exchange Act and a member of the National Association of Securities Dealers Regulation, Inc. (NASDR). AESC distributes various investment products such as no load mutual funds and variable annuities. In addition, investors may open a brokerage account with AESC. TRS plans to make its processing arrangement available to Cardmembers in connection with such brokerage accounts as well. Typically, such accounts would serve as vehicles for subsequent investment into one of the specific investment products noted.

TRS proposes to enter into an arrangement with AESC and individual Cardmembers, so that Cardmembers may appoint TRS as a processing agent to collect and promptly remit to AESC their voluntary, periodic payments for mutual fund shares or variable annuity products. TRS will not hold or control Cardmember funds, under this proposal, because it will only handle such funds pursuant to Cardmembers' directions to transfer such funds to AESC. Over a considerable period of time, a number of Cardmembers have requested the ability to purchase variable investments by means of the Card.<sup>2</sup> Over the past few years, we have evaluated how to safely and securely enable them to make these types of purchases. This proposal is the result of those requests and our careful consideration of the matter.

Under the proposed arrangement, a Cardmember will send a single check for both regular Charge Card purchases and for the purchase of mutual fund shares. TRS

<sup>1</sup> In contrast, the Division of Market Regulation recently addressed and granted an order of exemption in connection with the extension of credit to purchase shares of a business development company over the internet. See Technology Funding Securities Corporation, May 20, 1998. Because TRS' proposal only involves Charge Cards, it does not implicate the Exchange Act issues addressed in that exemption.

<sup>2</sup> For over eight years, Cardmembers have used Card payments as a mechanism for voluntary contributions to the fixed annuity products offered by AESC.

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P. 03/14  
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AMERICAN EXPRESS

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Mr. Scheidt  
September 8, 1998  
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will in turn promptly forward the payment for mutual fund shares to AESC and investors will receive the price on their mutual fund shares which is next computed after receipt of the order by AESC. The Cardmember may make withdrawals and changes to his or her brokerage account or terminate participation in the service by calling a toll free number administered and serviced by AESC.

TRS intends to enter into similar processing arrangements with other affiliated broker-dealers and is requesting no-action relief with respect to any such arrangements as well. TRS commits to refrain from entering into any similar arrangements with non-affiliated third party broker/dealers.

## II. The Payment Process

Prior to the commencement of the processing arrangement with respect to a Cardmember's account, the Cardmember will notify AESC of the amount he or she intends to invest on a monthly basis, the specific funds or variable annuity selections to which the Cardmember would like to contribute, and the allocation of investment amounts to each investment.

The Cardmember's intended investment amount will be reflected on his/her American Express Card billing statement as a reminder to remit such amount—monthly or quarterly depending on the Cardmember's preference. Since each investment is voluntary, non-payment will not affect the Cardmember's ability to charge on the Card, and unpaid investment amounts will not accrue interest or other charges.

- The Cardmember will send a single check in payment of his/her regular Charge Card bill along with the specified investment amount to a TRS payment processing center in Chicago, Illinois (the Processing Center). TRS, acting only as a conduit, will immediately enter the payment into its automated payment remit system. Payments received prior to a 2:00 p.m. cutoff will be processed through TRS's payment processing systems and forwarded to AESC within forty-eight hours. Investors will then receive the price next computed after receipt of the order by AESC.

## III. Payment Processing Safeguards

We have designed this processing arrangement with the safety of the Cardmember's money as the paramount consideration. Therefore, from the time the intended investment amount is received by TRS until the time of investment, AESC will

RESENT

P. 04/14

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THE NO. 0120101100

AMERICAN EXPRESS

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Mr. Scheidt  
September 8, 1998  
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assume full responsibility for the safety of such funds. This guarantees that Cardmembers will not be exposed to any risk of loss by using TRS as a processing agent for their intended investment amounts.

Further evidence of our attention to the safety of the Cardmember's money lies in the extraordinary safeguards in place at the Processing Center.

1. Payment processing procedures are automated.
2. From the time a payment arrives at the Processing Center until it is forwarded to AESC for investment, employees rarely touch an individual check because they handle batches of mail at a time.
3. When mail is delivered by the courier, employees load it into a sorting machine, which cuts each envelope on three sides to open and sorts the contents into batches of 250-300 pieces. The contents of the envelopes are then manually transferred in batches to a scanning machine which photographs and electronically verifies and enters the amount of the check into the payment processing system. The payment processing system then determines how the Cardmember's payments should be allocated between regular charge card payments and investment amounts and electronically forwards the appropriate investment amount to AESC for investing.
4. All sensitive areas (i.e., mailroom, special processing areas) of the Processing Center have surveillance cameras. Moreover, site supervisors have monitors at their workstations, which allow them to view sensitive areas of the Processing Center at all times.
5. All sensitive areas of the Processing Center are under dual control. As a result, there is never just one employee in a sensitive location.

#### IV. Other Safeguards

In addition to the payment processing safeguards which already exist at the Processing Center, TRS proposes the following additional safeguards:

1. **Supervision of TRS's activities.** TRS's activities under this proposal, including all payment processing functions, will be supervised by AESC. AESC will assume full responsibility for establishing, maintaining, and diligently enforcing a strict system of supervision and surveillance over TRS's activities at the Processing Center.

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P. 05/14

FAX NO.

INTERNET ADDRESS

OCT-27-98 TUE 01:07 PM

Ms. McGuire  
Mr. Scheidt  
September 8, 1998  
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2. **Supervision of Processing Center Employees.** TRS's Processing Center personnel (i.e., those responsible for retrieving mail from couriers and loading batches of mail into the automated processing machines) will be treated and controlled as if they were "associated persons" of AESC within the meaning of Section 3(a)(18) of the Exchange Act. Furthermore, the Processing Center will have a registered principal of AESC on site monthly to conduct an audit for compliance with AESC's instructions to TRS and the representations and requirements contained in this letter.
3. **Background Checks.** TRS will conduct an investigation of the backgrounds of all personnel in special processing areas to assure that such persons are not statutorily disqualified from becoming associated with AESC.
4. **Books and Records.** All books and records of TRS will be readily accessible to the supervisory personnel of AESC, the Commission, the NASDR, and other appropriate regulatory authorities.
5. **Fidelity Bond.** All personnel in special processing areas will be bonded under fidelity bonds. As a result of such bonds, the possibility of loss due to dishonest or fraudulent acts will be effectively eliminated.

**V. Limitations on the Activities of TRS**

With respect to this arrangement, TRS will act only in the capacity of a processor, which collects and promptly forwards the intended investment amount to AESC at the direction of the Cardmember.

1. **Limitations on Marketing.** Neither TRS nor its employees or any non-broker-dealer registered affiliates will market the availability of this administrative service or the underlying products and services offered by AESC.
2. **Limitations on Activities of Processing Center Employees.** No TRS employees or non-broker-dealer registered affiliates at the Processing Center will be involved in effecting transactions in securities. Instead, their tasks will be restricted to a) transporting envelopes from the mail trucks to the mailroom, b) loading batches of envelopes into an automated processing system, and c) periodically verifying images of checks photographed by the scanner.
3. **Limitations on Activities of TRS Customer Service Associates.** No TRS Customer Service Associates will be permitted to recommend, endorse, respond

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Ms. McGuire  
Mr. Scheidt  
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to questions or otherwise discuss matters involving brokerage accounts, mutual funds or related securities transactions. Rather, TRS Customer Service Associates will be trained to direct all securities related inquiries to AESC. In addition, an AESC (1-800) Client Service number will appear on the Cardmembers' Charge Card statement for any service issues pertaining to their investments.

4. **Absence of Credit.** TRS will not extend credit to any Cardmember for the purpose of purchasing securities through, or carrying securities with, AESC. As noted above, this processing arrangement will be available only for charge cards and not for credit cards.
5. **Limitations on Compensation.** TRS will not receive a referral fee of any kind from AESC nor will it receive any compensation that is based upon the total dollar amount invested by a Cardmember. Rather, TRS will charge a fee that will offset the expenses it incurs as a result of providing this service, together with a reasonable profit.

#### **VI. Activities of AESC**

Under the proposed arrangement, AESC will have exclusive responsibility for the following activities;

1. **Marketing.** Marketing materials describing the availability of TRS's processing arrangement, the timing on pricing of mutual funds, and the underlying products and services offered by AESC will be distributed exclusively by AESC. AESC will review and be fully responsible for the content of all marketing materials, advertising and other informational materials regarding the service. Any such materials will clearly indicate that TRS is not a registered broker-dealer, that all investment related inquiries should be directed exclusively to AESC, that TRS is a separate entity from AESC, and that mutual funds are being offered through AESC and not TRS.
2. **Securities Related Activities.** AESC will have responsibility for all securities related activities including, complying with all regulatory requirements, the opening of accounts, the entering of orders and the execution of transactions, setting up and maintaining customer files, and distributing order confirmations and statements after each payment is processed.

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Mr. Scheidt  
September 8, 1998  
Page 7

3. **Securities Related Questions and Servicing.** AESC will have responsibility for responding to all securities related questions and service issues through its (1-800) Client Service number.

#### VII. Analysis of the Rule 22c-1 Pricing Issue

Under Section 22(c) of the 1940 Act and Rule 22c-1 thereunder, mutual fund shares must be priced based upon the net asset value next calculated after an order is received. The proposed arrangement will comply with Rule 22c-1 because the receipt of the order for purchase of mutual fund shares, within the meaning of Rule 22c-1, occurs at the time AESC receives the order.

Rule 22c-1 extends its stated pricing requirements only to registered investment companies, persons designated in an issuer's prospectus as authorized to sell or redeem a company's shares, or principal underwriters or dealers of such shares. Under the proposed processing arrangement, TRS will not act in any of the foregoing capacities. Rather, TRS will act as a processing agent at the direction of the Cardmembers. TRS will not be designated as AESC's agent in a fund prospectus or otherwise, nor has it been delegated any function in connection with AESC's mutual fund operation. Instead, TRS has designed a service that is intended to provide a convenient way for Cardmembers to make voluntary payments for mutual fund shares.

The staff has agreed in certain other situations involving an investor, a "payment processing agent" and a mutual fund company that the pricing provisions of Rule 22c-1 would be triggered by receipt of an order by the mutual fund company or its designated bank, and not at the "payment processing agent" step. See, e.g., Patrick P. Badamy, M.D., SEC No-Action Letter, LEXIS 1495 (pub. avail. Apr. 7, 1972); Consolidated Programs, Inc., SRC No-Action Letter, LEXIS 1771 (pub. avail. Mar. 22, 1973). In the Badamy letter, the staff recognized that a custodian or trustee under a Keogh Plan does not function as a dealer, underwriter, or fund designee as set forth in Rule 22c-1, but instead as the mutual fund purchaser's agent. As a result, Rule 22c-1 would apply at the fund, underwriter or fund designee level. Similarly, in the Consolidated Programs letter (CPI), the staff issued assurances with respect to CPI's proposal to act as agent for individual mutual fund purchasers, receiving their payments for fund share purchases through a computerized billing system and forwarding them to the fund's designated bank. Under CPI's proposal, customers would receive the fund share price next computed after receipt by the fund's bank.

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Page 3

The facts presented in CPI bear a strong resemblance to the processing arrangement proposed by TRS. Like CPI, TRS proposes to institute a processing arrangement to provide enhanced convenience to mutual fund purchasers. Although in its letter CPI noted that it was not affiliated with any mutual fund advisor or custodian, we do not believe the fact that TRS is affiliated with AESC should alter the staff's conclusion. In Badamy, the staff specifically addressed the fact that payment processing agents would be recommended by a fund and determined that such a recommendation would not change the analysis. Like the investor agents in that case, TRS will be acting solely as an agent of the purchaser. As a result, TRS should not be subject to the timing requirements of Rule 22c-1.

Our position is consistent with the policies underlying Rule 22c-1. In the Release adopting the rule, the Commission made clear that one of its most important purposes was to address the speculative practices that could result from backward pricing. Specifically, the Commission expressed its concern that the purchase or sale of fund shares at a price based upon a previously determined net asset value could permit a speculator to take advantage of fluctuations in the prices of the fund's underlying securities that occurred after the fund last calculated its net asset value.<sup>4</sup> The proposed program is fully consistent with this aim, as purchases of fund shares will be effected at the next computed price upon receipt of the order by AESC. There is no opportunity in the process for speculation by investors. To participate in the proposed program, investors will choose the convenience of purchasing mutual funds and paying Charge Card balances by writing a single check to TRS. Because the marketing materials prepared and distributed by AESC will fully disclose the mechanics of this arrangement, Cardmembers will be informed that pricing of their mutual fund purchases will occur when their order is received by AESC and not when payment is received by TRS.

#### **VIII. Analysis of the Broker-Dealer Registration Issue**

Because of the safeguards and the ministerial nature of TRS's activities as a processing agent, we submit that neither TRS nor any of its employees or affiliates (other than AESC) are required to register with the Commission as broker-dealers under Section 15(b) of the Exchange Act in connection with this proposal.

Section 3(a)(4) of the Exchange Act defines a "broker" as any person, other than a bank, "engaged in the business of effecting transactions in securities for the account of others." Section 3(a)(5) of the Exchange Act defines a "dealer" as any person,

<sup>4</sup> Investment Company Act Release No. 3319, October 19, 1968.

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September 8, 1998  
Page 9

other than a bank, "engaged in the business of buying and selling securities for his own account, through a broker or otherwise". Section 15(a) of the Exchange Act provides that "it shall be unlawful for any broker or dealer to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security, unless the broker or dealer is registered in accordance with Section 15(b)." (emphasis added)

Both the Commission staff and the NASDR have long concluded that an entity or person is not "effecting transactions" in securities if it is merely carrying out a clerical or ministerial function. See Aetna Casualty and Surety Company, 1988 SEC No-Action Letter, LEXIS 386 (pub. avail. Dec. 21, 1987); Chubb Securities Corporation, 1993 SEC No-Action Letter, LEXIS 1204 (pub. avail. Nov. 24, 1993); Applied Financial Systems, 1971 SEC No-Action Letter, LEXIS 4075 (pub. avail. Sept. 25, 1971); Dreyfus Group Equity Fund, 1971 SEC No-Action Letter, LEXIS 1000 (pub. avail. Jun. 26, 1971). See also Exchange Act section 3(a)(18) (defining the term associated person of a broker or dealer to exclude those persons who perform purely clerical or ministerial acts); NASDR By-Laws, Persons Exempt from Registration, Rule 1060(a)(1) (providing that "persons associated with a member are not required to be registered if their functions are solely and exclusively clerical or ministerial").

TRS's activities as a mere processing agent clearly fall within the activities which the staff has previously held to be purely clerical or ministerial in nature. The only function of TRS with respect to the securities business is to collect and promptly transfer periodic investment amounts to AESC in the interest of convenience and at the direction of the Cardmember.

As described above, AESC, a registered broker-dealer, will be responsible for all marketing activities related to TRS's proposed processing arrangement as well as for the underlying products and services offered by AESC. TRS will not advertise its role as a processor of Cardmembers' investment payments to AESC. AESC will have exclusive responsibility for the opening of accounts, the entering of orders, the execution of transactions, transferring investment monies to the appropriate mutual fund companies, and distributing account confirmations and statements. TRS will engage in none of these securities-related activities. Rather, TRS will restrict its activities to the ministerial tasks of loading envelopes into processing machines which will electronically enter the intended investment amount into TRS's payment processing system and promptly forward such payment to AESC. AESC is responsible for responding to all Cardmembers' securities-related questions and service issues. TRS employees and unregistered affiliates will be strictly prohibited from recommending, endorsing, responding to questions or engaging in any negotiations involving brokerage accounts or related securities transactions.

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Mr. Scheidt  
September 8, 1998  
Page 10

Moreover, the extensive internal safeguards offered by TRS provide abundant protection against risk of loss to Cardmembers and their intended investment amounts.

In light of the extensive safeguards proposed by TRS as well as the ministerial nature of TRS's role as a processing agent and AESC's role as the registered broker-dealer, TRS should not be required to register as a broker-dealer. While several SEC no-action letters lend strong support to our conclusion, the Aetna Casualty and Surety no-action letter, *supra*, is particularly applicable because it involved a processing arrangement similar to the one proposed by TRS. Although TRS is not a state licensed insurance company like Aetna, the circumstances and underlying rationale are much the same.

Just as TRS is seeking to extend the Charge Card's use as a bill paying mechanism to include voluntary payments for mutual funds, Aetna sought to extend its authorized check plan (the Aetna Service Account) to include payments for variable life insurance policies, a securities product like the mutual funds in this case, Aetna's proposal allowed customers, who had more than one insurance and variable life insurance policy to send a single monthly payment to Aetna, an entity not registered as a broker-dealer. Aetna, in turn, would process and allocate premiums on variable life insurance policies as well as on casualty and property insurance. The staff granted Aetna's no-action request concluding that Aetna, as a mere conduit of funds, was only engaged in clerical and ministerial activities.

The same rationale should apply with equal force to TRS's proposal. TRS, like Aetna, is an unregistered entity, although one that is subject to detailed regulation as a result of its participation in a regulated industry.<sup>1</sup> TRS, like Aetna, proposes to effectively limit its role to that of a conduit which collects and promptly transfers investment monies to a registered broker-dealer. The TRS proposal, like the Aetna proposal, protects investors from risk of loss inherent in any breakdown during the transfer process. In addition, the regulatory requirements and responsibilities imposed on AESC as a registered broker-dealer and the contractual restraints and strict limitations imposed on TRS as a processing agent so greatly minimize any risk to the public that no purpose would be served by subjecting TRS to the

<sup>1</sup> TRS must comply with the strict statutory requirements of the Consumer Credit Protection Act, including Section 226.10 (Prompt Crediting of Payments) of Regulation Z promulgated thereunder. TRS' compliance with such Act and related regulation is enforced by the Federal Trade Commission.



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Mr. Scheidt  
September 8, 1998  
Page 11

regulatory authority of the Commission. Therefore, the staff's conclusion that Aetna would not have to register as a broker-dealer applies directly to TRS.<sup>6</sup>

On several other occasions, the staff has agreed that broker-dealer registration is unwarranted when entities and/or persons perform clerical and ministerial services similar to the kind of processing arrangement proposed by TRS. See Carlos M. Urrutia, 1980 SEC No-Action Letter, LEXIS 3729 (pub. avail. Sept. 26, 1980) (taking and transmitting orders for securities, determined to be a clerical and ministerial service); Dreyfus Group Equity Fund, SEC No-Action Letter, Lexis 1000 (pub. avail. Jun. 26, 1971) (maintaining shareholder records, processing investments and redemptions of mutual fund shares, data processing, and mailing shareholder information determined to be clerical and ministerial services). Like the entities involved in the foregoing no-action letters, TRS, as a bill processing agent, will perform a purely clerical and ministerial task and therefore will not effect securities transactions or otherwise engage in securities-related activities.

Historically, the staff has indicated a concern when non-registered entities become engaged in marketing activities<sup>7</sup> or enter into compensation arrangements based on securities transactions.<sup>8</sup> TRS has responded to the staff's historical concerns by ensuring that none of its activities involve, or even approach, the functions that are the hallmark of broker-dealer activity. TRS will not engage in any marketing activities related to its proposed processing arrangement or the underlying securities products that can be purchased through the service. As a result, the staff should conclude that TRS is not required to register as a broker-dealer for engaging in limited processing activities for AESC at the direction of Cardmembers.

<sup>6</sup> This result is not affected by the fact that investors may send a check payable to TRS that will include payment for mutual funds because TRS, as a mere conduit, will not have control of investment monies. See Aetna No Action Letter, *supra*, where the staff agreed that "no control of customer's funds by Aetna exists, even if Aetna has momentary possession of these funds...because Aetna handles the funds only pursuant to customers' directions to transfer them...."

<sup>7</sup> See Lincoln Financial Advisors Corporation, SEC No-Action Letter, Lexis 303 (1998) (the staff refused to take a no-action position where Lincoln sought to enter into arrangements with certain insurance companies and their affiliated agencies through which insurers and agencies would become actively and intimately involved in selling mutual funds).

<sup>8</sup> See George T. Taylor, SEC No-Action Letter, 1971 SEC No-Action Letter, Lexis 3245 (Sept. 3, 1971) (the staff issued a negative response to a proposal to establish a restaurant containing telephone lines to brokerage houses, where the restaurant would receive a transaction-based payment from those brokerage houses).

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Mr. Scheldt  
September 8, 1998  
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**IX. Conclusion**

On the basis of the foregoing, we submit that TRS's role is not as an underwriter, dealer or other person designated by a fund to consummate transactions in its shares, but as the mutual fund purchaser's agent in the payment process. As such, the pricing requirements of Rule 22c-1 should not be triggered upon receipt of the payment by TRS, but at the point the order reaches AESC.

We further submit that since TRS's role is restricted to the ministerial task of collecting the intended investment and promptly remitting it to AESC in the interest of convenience and at the direction of the Cardmember, TRS should not be required to register as a broker-dealer under Section 15(b) of the Exchange Act.

We would like to meet with you and/or the appropriate members of your staff in the near future to discuss this matter. I will call you in the next couple of days to schedule the meeting. If you have any questions in the meantime, please feel free to contact me at (612) 671-8626.

Sincerely,

  
Colleen Curran

cc: Jack Drogin  
Anna Jacob

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P. 13/14

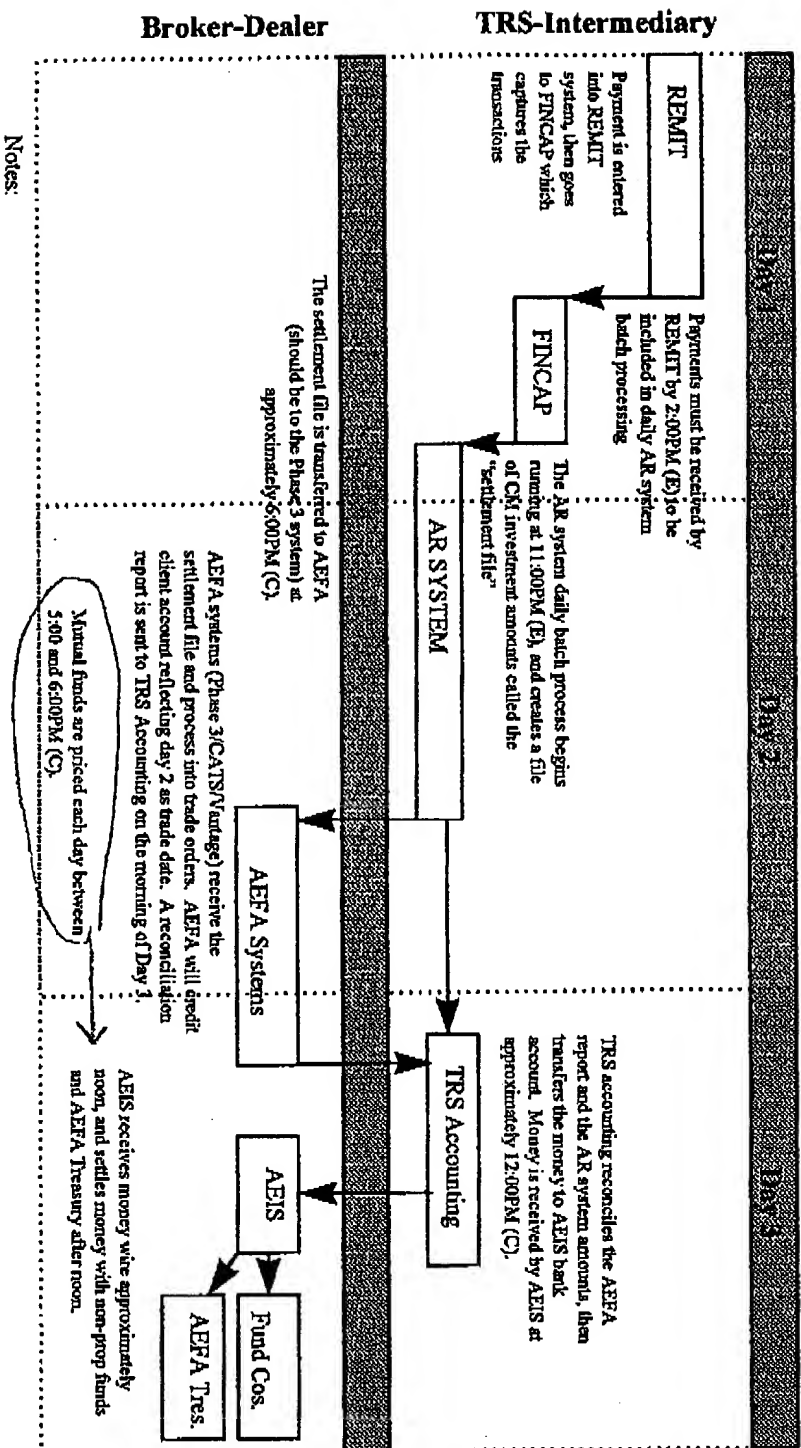
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## Investing on the Card Data and Money Flow

*Note: this flow process needs to be verified.*



# **EXHIBIT M**

# memorandum

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VB-34

September 11, 1998

TO: Sheri Beck  
Bob Elconin  
Rockell Metcalf

FROM: Colleen Curran *cc*

RE: Investing on the Card Strategy

I would like your comments on the attached memo regarding Investing on the Card by the end of the day on Monday. Sorry about the short turnaround time, but I would like your comments before I go to Gordon and Richard. I ran this strategy by Dick Phillips, except for the trade association stuff, and he gave several suggestions that I incorporated into the memo. I've put a call into the SEC to set up a meeting, but only talked to voicemail. Thanks again for your help.

#87309

# memorandum

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September 11, 1998

TO: Dave Hubers  
Brian Kleinberg  
Louise Parent

CC: Sheri Beck  
Gordon Eid  
Bob Elconin  
Rockell Metcalf  
Richard Starr

FROM: Colleen Curran

RE: Strategy for Investing on the Card

As you know, we are about to start round 2 with the SEC regarding Investing on the Card. We believe our revised position makes an even stronger case for SEC approval. At the same time, we know the SEC will be breaking new ground by granting our no-action request. Given the importance of success with the SEC to our business partners, I would like your ideas about the following proposed strategy for working with the SEC. I have discussed this strategy with my GCO and Government Relations colleagues and Dick Phillips of Kirkpatrick & Lockhart and they concur.

1. Meet with the SEC staff. We are going to meet with lower level SEC staff so that we have an opportunity to learn the staff's concerns before facing more senior level staff. We are going to include Dick Phillips in that meeting. Dick's presence demonstrates the importance of this project.
2. Meet with senior SEC staff. If we are unable to persuade the lower level SEC staff, we are going to ask to meet with the senior SEC staff, at the Director level. Again, Dick Phillips would be at that meeting.
3. Dave/Harvey contact with Chairman Levitt. If we are unable to persuade the senior SEC staff, we may want Dave and/or Harvey to contact Chairman Levitt to discuss the policy reasons supporting our position. In my days at the SEC, this would be a highly unusual circumstance, with potential for significant harm to our ongoing relationships with the SEC. Chairman Levitt, however, seems to be open to contact by the industry. We would still need to carefully orchestrate any such conversations to avoid damage to our relationships with the SEC staff. We would advise Dave and/or Harvey to focus on the policy issues and would not recommend that they contact Chairman Levitt if the SEC staff was concerned about technical legal issues.

4. Contacts with Trade Associations. We do not believe it would be helpful to our cause to involve the trade associations in our discussions with the SEC. We have already influenced the ICI to specifically carve out an exception for charge cards in their letter to the SEC raising concerns about the use of credit cards to purchase mutual funds. We would expect that neither the SIA nor ICI would be interested in pursuing our position because of its uniqueness in the industry.

#87308

# **EXHIBIT N**





VB-34

October 1, 1998

American Express  
General Counsel's Office  
World Financial Center  
New York, NY 10285

VIA FACSIMILE

Mr. Jack Drogin  
Division of Market Regulation  
Securities and Exchange Commission  
SEC Stop 7-10  
450 5<sup>th</sup> Street, N.W.  
Washington, D.C. 20549

Dear Mr. Drogin:

I have attached for your review a copy of Section 226.10 (Prompt Crediting of Payments) of Regulation Z, under the Consumer Credit Protection Act (the "Act"). American Express Travel Related Services Company's ("TRS") compliance with the Act is enforced by the Federal Trade Commission. I have also attached the Official Staff Commentary of the Federal Reserve Board on Section 226.10's Prompt Crediting of Payments requirement. This federal regulation is a compelling example of how TRS must handle customer funds carefully and responsibly.

We will also submit a supplemental memorandum discussing the overall federal and state regulatory regime which governs TRS.

We look forward to having the opportunity to meet you and discuss these issues in your offices. Please call me at 212-640-5760 if you have any questions.

Sincerely,

Rockell Metcalf  
Vice President &  
Group Counsel

cc: Colleen Curran  
Sheri Beck  
Anna Jacob

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Securities & Exchange Commission  
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*14*

Message:

*Michael - Per my voice mail-attached is information relating to Investing on the Card. I will also forward the Disclosure form to Colleen Cannon so she has it and can fill it out. After all I will be talking about the importance of this form.*

*Sincerely,*

*Patrice Jacobson*

If you do not receive all the pages, please call back immediately.

THIS FACSIMILE CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THE FACSIMILE IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION OR COPYING OF THIS FACSIMILE IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE AND RETURN THE ORIGINAL FACSIMILE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

# **EXHIBIT P**

VB-84

## **AGENDA FOR NOVEMBER 3, 1998**

### **Meeting with the SEC Staff**

- I. INTRODUCTION
  - A. Background  
**C. Curran**
  - B. Kirkpatrick & Lockhart's Involvement and Support  
**D. Phillips**
- II. THE MONEY FLOW PROCESS  
**R. Metcalf**
- III. THE REGULATION OF TRS'S CARD BUSINESS  
**R. Metcalf**
- IV. THE BROKER-DEALER REGISTRATION ISSUE  
**D. Phillips, R. Metcalf**
- V. THE RULE 22c-1 PRICING ISSUE  
**S. Beck, D. Phillips**
- VI. PUBLIC POLICY  
**C. Curran**

November 3, 1998  
Meeting with SEC Staff  
Regarding  
TRS' Proposed Processing Arrangement

Attendees: S. Beck  
C. Curran  
J. Drogin  
A. Jacob  
P. Jensen  
C. McGuire  
K. McMillan  
R. Metcalf  
R. Phillips

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- I. THE AGENDA**
- II. THE ISSUES HIGHLIGHTED**
  - A. Introduction**
  - B. The Broker-Dealer Registration Issue**
  - C. The Rule 22c-1 Pricing Issue**
  - D. Public Policy**
- III. THE SUPPORTING SEC NO-ACTION LETTERS**
  - A. AETNA Casualty and Surety Company, SEC No-Action Letter, LEXIS 386 (pub. avail. Dec. 21, 1987)**
  - B. Dreyfus Group Equity Fund, SEC No-Action Letter, LEXIS 1000 (pub. avail. June. 26, 1971)**
  - C. Patrick Badamy, M.D., SEC No-Action Letter, LEXIS 1495 (pub. avail. Apr. 7, 1972)**
  - D. Consolidated Programs, Inc., SEC No-Action Letter, LEXIS 1771 (pub. avail. Mar. 22, 1973)**
- IV. A MEMORANDUM DETAILING THE STRICT REGULATION OF TRS' CARD BUSINESS**
- V. A COPY OF SECTION 226.10 (PROMPT CREDITING OF PAYMENTS) OF REGULATION Z**

# **AGENDA FOR NOVEMBER 3, 1998**

## **Meeting the SEC Staff**

### **I. INTRODUCTION**

**A. Background**  
**C. Curran**

~~**B. Kirkpatrick & Lockhart's Involvement and Support**~~  
~~**D. Phillips**~~

### **II. THE MONEY FLOW PROCESS**

**R. Metcalf**

### **III. THE REGULATION OF THE TRS'S CARD BUSINESS**

**R. Metcalf**

### **IV. THE BROKER/DEALER REGISTRATION ISSUE**

**D. Phillips, R. Metcalf**

### **V. THE RULE 22c-1 PRICING ISSUE**

**S. Beck, D. Phillips**

### **VI. PUBLIC POLICY**

**C. Curran**



## I. THE ISSUES HIGHLIGHTED

### A. Introduction

American Express Service Corporation ("AESC") would like to use American Express Travel Related Services Company, Inc. ("TRS") as a processing agent which collects and promptly remits to AESC Cardmembers' voluntary, periodic payments for mutual fund shares or variable annuity products.

### B. The Broker-Dealer Registration Issue

TRS should not be required to register as a broker-dealer because:

- TRS will be merely acting as a collection agent, whose function is solely clerical and ministerial. TRS's activities will be limited to the ministerial tasks of loading envelopes into a processing machine which will electronically process and promptly forward Cardmembers' investment amounts to AESC. See the attached copies of AETNA Casualty and Surety Company, 1988 SEC No-Action Letter, LEXIS 386 (pub. avail. Dec. 21, 1987) and Dreyfus Group Equity Fund, 1971 SEC No-Action Letter, LEXIS 1000 (pub. avail. June 26, 1971), where the staff agreed that serving as a mere processing agent is purely clerical and ministerial in nature.
- TRS has carefully and thoughtfully designed its proposed processing arrangement so that Cardmembers will not be exposed to any risk of loss by using TRS as a processing agent for their investment amount.
- AESC will have exclusive responsibility for all functions which have historically been considered broker-dealer activities.

### C. The Rule 22c-1 Pricing Issue

Since TRS's role under the proposed arrangement is effectively limited to that of a processing agent, the pricing requirements of Rule 22c-1 should not be triggered upon receipt of payment by TRS, but at the point the order reaches AESC. See the attached copies of Patrick P. Badamy, M.D., SEC No-Action Letter, LEXIS 1495 (pub. avail. April 7, 1972) and Consolidated Programs, Inc., SEC No-Action Letter, LEXIS 1771 (pub. avail. Mar. 22, 1973), where the staff agreed that the pricing provisions of Rule 22c-1 would be triggered by receipt of an order by the mutual fund company or its designated bank and not upon receipt by the payment processing agent.

#### D. Public Policy

There are strong and compelling policy reasons for AESC's proposed processing arrangement with TRS:

- **INVESTOR PROTECTION**

Cardmembers who choose to use TRS's bill paying services to invest are protected by:

- Strict marketing and disclosure requirements
- Elaborate procedures designed to safeguard Cardmember funds
- Supervision of TRS activities by AESC
- Ultimate liability of AESC

In addition, Cardmembers are protected by the prompt crediting of payments and related rules of the Consumer Credit Protection Act, which are enforced by FTC for charge cards.

- **FUNCTIONAL REGULATIONS**

AESC is subject to extensive regulation by the SEC as a broker-dealer. TRS is subject to extensive regulation by the FTC as a charge card company. To require TRS to also be registered as a broker-dealer is too duplicative and unnecessary.

- **INVESTOR CHOICE**

For several years, Cardmembers, particularly those involved in the similar program for fixed annuities, have requested this processing arrangement because it gives them an additional **choice** in how they can invest and gain access to the securities markets.

- **INVESTOR FLEXIBILITY**

This processing arrangement gives more **flexibility** to the investor than a bank authorization or similar periodic plan. Investment contributions can increase or decrease monthly according to the investor's current financial situation.

- **INVESTOR CONVENIENCE**

This processing arrangement is **convenient** because it allows a Cardmember to send a single check for both regular Charge Card purchases and for the purchase of mutual fund shares. This ease of investing serves to encourage the public to invest and save.

- **DEMONSTRATED SAFETY AND EFFECTIVENESS**

For the past eight years, Cardmembers have made contributions to their fixed annuities. \$1.2 billion in fixed annuity premiums have been processed without a single complaint.

- **CHARGE NOT CREDIT**

This processing arrangement is limited to **charge cards** and does not involve an extension of credit to purchase securities since the broker-dealer only executes the trade after it receives the Cardmember's investment contribution.

**AETNA Casualty and Surety Company, SEC No-Action Letter, LEXIS  
386 (pub. avail. Dec. 21, 1987)**

In the AETNA letter, the staff agreed that broker-dealer registration was unwarranted when AETNA served as a processing agent for variable life insurance policies. The staff concluded that investors were sufficiently protected from any risk of loss inherent in any breakdown during the transfer process.

2ND LETTER of Level 1 printed in FULL format.

1988 SEC No-Act. LEXIS 386

Securities Exchange Act of 1934 -- Section 15(a)

Jan 12, 1988

[\*1] Aetna Casualty and Surety Company

TOTAL NUMBER OF LETTERS: 2

SEC-REPLY-1: UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549  
December 21, 1987

George N. Gingold, Esq.  
Law Department  
The Aetna Casualty and Surety Company  
151 Farmington Avenue  
Hartford, Connecticut 06156

Dear Mr. Gingold:

This letter responds to your letter of September 11, 1987 on behalf of The Aetna Casualty and Surety Company ("Aetna"), in which you request assurance that the staff of the Division of Market Regulation will not recommend enforcement action if Aetna collects and allocates premiums for variable life insurance policies without being required to register as a broker or dealer under section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act"). Based on the representations made in your letter and in our subsequent telephone conversations, I understand the facts to be as follows.

Two entities are chiefly involved. Aetna itself, a wholly-owned subsidiary of Aetna Life and Casualty Company, is a Connecticut insurance corporation engaged principally in the sale of all types of casualty and property insurance. Aetna markets this insurance, including automobile, homeowners, and various other types of personal [\*2] items coverage, directly to individuals.

The other entity, Aetna Life Insurance and Annuity Company ("ALIAC"), also is a Connecticut insurance corporation and a wholly-owned subsidiary of Aetna Life and Casualty Company. ALIAC is engaged principally in the sale of life insurance, health insurance, and annuity contracts. Among the contracts sold by ALIAC are registered variable annuity and variable life insurance contracts. ALIAC is registered as a broker-dealer under the Exchange Act for the purpose of selling these variable contracts, which it does directly through its own sales force and through other broker-dealers.

For its life insurance policies, ALIAC has had in the past administrative systems under which a customer could pre-authorize automatic withdrawals from a checking account to pay premiums at specified intervals. Under these arrangements ("authorized check plans" or "ACPS"), customers need not prepare and mail premium payments and the insurer can be certain of timely payment. A

1988 SEC No-Act. LEXIS 386, \*2

Page 4

separate customer authorization typically exists for each policy. Aetna recently has developed its own ACP, the Aetna Service Account ("ASA"), which permits a single monthly payment by [\*3] a customer who has several policies with Aetna, ALIAC, or both, even though these policies have different premium due dates, durations, and renewal dates.

Aetna now proposes that payments of premiums due on ALIAC's registered variable life insurance policies be eligible for inclusion in ASA under the following circumstances. On the eighth day of each month, ALIAC produces an electronic billing record for ASA, which then merges the ALIAC billing record with casualty product billing records. The combined billing record is delivered to the Connecticut Bank and Trust Company ("CBT") in Hartford, Connecticut for processing through established banking channels.

*The Aetna Service Account merges the Aliac billing record with Aetna's casualty billing records.*

On the fifteenth day of each month or, if the fifteenth falls on a weekend or a holiday, the next working day, CBT begins the collection process. On the day when the collection process begins, ASA proposes to transfer electronically to ALIAC the amount cited to CBT for collection. ALIAC proposes to apply these funds to each individual policy at the price next calculated following receipt of the electronic advice from ASA. You represent that, if insufficient funds are present within a customer's checking account to equal the [\*4] total amount due for all policies, the automatic withdrawal does not take place at all, so that Aetna is not forced to allocate available funds among the policies. ASA also proposes to initiate the billing process twice monthly, commencing on either the eighth or the twenty-second of each month. Each policy, however, will be eligible for inclusion in the billing cycle only once per month, and each customer will elect the cycle to be followed for each policy.

You conclude that broker-dealer registration would not be required for Aetna as a result of its involvement in this program, because its activities would be limited to those of a clerical and ministerial nature. In your opinion, no control of customers' funds by Aetna exists, even if Aetna has momentary possession of these funds through ASA, because Aetna handles the funds only pursuant to customers' directions to transfer them to ALIAC. You support this conclusion with two arguments.

*OBY!*

First, customers' payments will be applied as quickly as they would have been had a transfer been made directly from the customers' checking accounts to ALIAC. Second, there will be no risk to the customer related to delay in transmission [\*5] and no risk of investment gain or loss from the time of transfer to the time of investment. This lack of risk accords with ALIAC's normal procedures, which involve the immediate processing of payments regardless of due date. If, for some unforeseeable reason, the second transfer from ASA to ALIAC failed to occur even after the first transfer from CBT to ASA, ALIAC nevertheless would apply the payments at the time and in the manner anticipated, as though the second transfer had timely occurred. As between ALIAC and the customer, ALIAC thus assumes the risk of loss inherent in any breakdown of the transfer process. You represent that receipt of customers' funds by Aetna through ASA will be deemed to be receipt of these funds by ALIAC, the broker-dealer responsible for the registered variable annuity and variable life insurance contracts.

You also represent that, for payments applied to premiums for registered variable life insurance policies through ASA, ALIAC will provide customers with

1988 SEC No-Act. LEXIS 386, \*5

Page 5

confirmations meeting the requirement of the Exchange Act, Rule 10b-10 thereunder, and a previous no-action letter from the Division of Market Regulation to ALIAC. n1 Each participating customer [\*6] also will receive a monthly bank statement reflecting all ASA withdrawals during the period covered by the statement; in addition, Aetna will provide customers with monthly statements of ASA activity. You conclude that customers effectively will receive two confirmations of Aetna's withdrawals from their accounts to pay premiums through ASA.

n1 Letter from Lynne G. Masters, Attorney, Office of Chief Counsel, Division of Market Regulation, SEC, to Michael Berenson, Esq., Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey (Jan. 9, 1987) (Aetna Life Insurance and Annuity Company).

You further represent that Aetna has agreed to maintain records of ASA transactional activity regarding ALIAC's registered variable life insurance products in the form and for the duration required for broker-dealer books and records under section 17 of the Exchange Act and the rules thereunder, particularly Rules 17a-3 and 17a-4. Finally, you represent that Aetna's records of this ASA transactional activity will be deemed to be records of the broker-dealer ALIAC and that Aetna either will provide copies of these records to ALIAC for inspection by the appropriate regulatory authorities upon [\*7] request or will make these records available for inspection itself. You conclude that Aetna and ALIAC thus will provide the necessary audit trail to ensure that all securities transactions effected through ASA as described above are completed and confirmed in accordance with the requirement of the Exchange Act and the rules thereunder.

Based on the facts and representations set forth above, the staff will not recommend enforcement action if Aetna collects and allocates premiums for ALIAC's variable life insurance policies as you describe without registering as a broker or dealer under section 15(a) of the Exchange Act. This position concerns enforcement action only and does not express any legal conclusions on the applicability of the statutory or regulatory provisions of the federal securities laws. This position is based solely on the representations that you have made, and any different facts or conditions might require a different response.

Sincerely,  
John Polanin, Jr.  
Attorney  
Office of Chief Counsel  
(202) 272-2848

INQUIRY-1: Aetna Law Department  
151 Farmington Avenue  
Hartford, CT 06156  
(203) 273-4686  
September 11, 1987

Mr. Robert L. D. Colby, Chief Counsel  
Division of Market Regulation  
[\*8] Securities and Exchange Commission  
450 Fifth Street, N.W.

1988 SEC No-Act. LEXIS 386, \*8

Page 6

Washington, DC 20549

Re: The Aetna Casualty and Surety Company  
No-Action Request  
Status as Broker or Dealer under the 1934 Act

Dear Sirs:

We respectfully request the Division of Market Regulation ("Division") indicate it will not recommend enforcement action to the Securities and Exchange Commission against the Aetna Casualty and Surety Company ("Aetna") if Aetna takes the steps described below without being required to register as a broker or as a dealer in accordance with Section 15(a) of the Securities Exchange Act of 1934 ("1934 Act").

Aetna, a wholly-owned subsidiary of Aetna Life and Casualty Company, is a Connecticut insurance corporation engaged principally in the sale of all types of casualty and property insurance. Aetna markets such insurance directly to individuals, including automobile, homeowners and various other types of personal items coverage.

Aetna Life Insurance and Annuity Company ("ALIAC") is also a Connecticut insurance corporation and a wholly-owned subsidiary of Aetna Life and Casualty Company. ALIAC is engaged principally in the sale of life insurance, health insurance and annuity contracts. [\*9] Among the contracts it sells are registered variable annuity and variable life insurance contracts; ALIAC is registered as a broker/dealer under the 1934 Act for the purpose of selling such variable contracts, both directly through its own sales force and through other broker/dealers.

ALIAC, with its life insurance policies, has had for years administrative systems under which a customer could pre-authorize automatic withdrawals from his or her checking account for the purpose of making premium payments at specified intervals. Such arrangements (called "authorized check plans" or "ACPs") are convenient both for the customer who does not have to prepare and mail premium payments, and to the insurer, which can be certain of timely payment. Typically, a separate authorization exists for each policy.

A few years ago, Aetna developed what it calls the Aetna Service Account ("ASA"). Essentially, the ASA ACP Plan permits a single monthly payment by the customer, even though the customer has multiple policies with Aetna, ALIAC or both, and even though those policies have different premium due dates. The existence of multiple policies with a single insurance company is quite common. [\*10] For example, automobile, homeowners and personal items coverages are three distinct types of coverage, and a given individual may have more than one automobile policy or one homeowners policy. These policies may be for different durations and have different renewal dates; the desirability of a combined payment facility, from the standpoint both of insurer and insured, is self-evident.

Many Aetna customers also own life insurance policies issued by ALIAC, as well as casualty policies issued by other Aetna companies. ASA provides that a single periodic payment made by the customer could be applied to pay premiums on life insurance policies as well as on automobile, homeowners and other



casualty-property policies. To date, however, ASA has not been extended to cover variable life insurance policies, interests in which are required to be registered under the Securities Act of 1933 and sold by a registered broker/dealer. It is the latter possibility which is the subject of this letter.

In ASA, the vast majority of payments are to cover premiums which will become due on automobile, homeowners and other casualty-property policies. It is in that area where multiple policy ownership [\*11] most often makes the establishment of a payment facility such as ASA mutually advantageous to insurer and insured. This administrative service has worked well for a small volume of nonregistered life insurance policies. No purpose would be served by requiring a separate ASA facility for registered products.

We propose that ALIAC's variable life insurance policies be eligible for inclusion in ASA under the following circumstances. On the eighth day of each month ALIAC produces an electronic billing record for ASA. ASA then merges the ALIAC billing record with casualty product billing records. The combined computer billing record is then delivered to Connecticut Bank and Trust Company ("CBT"), Hartford, Connecticut for processing through established banking channels. On the 15th day of each month or, if the 15th falls on a weekend or holiday, the first working day thereafter, CBT begins the collection process. On the day the collection process begins ASA proposes to electronically transfer to ALIAC the amount cited to CBT for collection. ALIAC proposes to apply the funds to each individual policy at the price next calculated following receipt of the electronic advice from [\*12] ASA. ASA proposes to initiate the billing cycle twice monthly, commencing on either the 8th or the 22nd of the month. However, each policy will be eligible for inclusion in the billing cycle only once per month. The customer will elect the cycle in which each policy is to be included.

Two facts are central in the analysis. First, the purchase payment will be applied as quickly as it would have been had a transfer been made directly from the customer's checking account to ALIAC. Second, there are no questions related to delay in transmission, and no question of who bears the risk of investment gain or loss from the time of transfer to the time of investment. This accords with ALIAC's normal procedures, which involve the immediate processing of purchase payments regardless of the due date.

Under the proposed extension of ASA to registered life insurance products, Aetna would act only as a conduit. ~~Because the transfer from Aetna to ALIAC is as nearly simultaneous as practicable with the transfer from the customer's checking account to Aetna, Aetna would not possess customer funds for any measurable period of time. If for some unforeseeable reason the second transfer failed [\*13] to take place even after the first one was made, ALIAC would nevertheless apply the purchase payment at the time and in the manner anticipated as though the second transfer had taken place on a timely basis. As between ALIAC and the customer, ALIAC assumes the risk of loss inherent in any breakdown in the transfer process.~~

~~No control of customer fund by Aetna exists, even if there is momentary possession, because Aetna handles such funds only in accordance with customer directions that there be a transfer to ALIAC. Such limited involvement by Aetna is in our judgment clerical and ministerial. See Applied Financial Systems,~~

Inc. (available August 27, 1971).

For purchase payments applied to the purchase of a registered security under ASA, ALIAC will provide customers with annual confirmations meeting the requirements of the 1934 Act, Rule 10b-10 thereunder, and a previous "no-action" letter from the Division to ALIAC. In addition, the customer will receive a monthly bank statement reflecting all ASA account withdrawals during the period covered by the statement, and Aetna will provide monthly statements of ASA account activity. In substance, then, customers will receive [\*14] two confirmations of Aetna's withdrawals to make premium payments through ASA.

As a condition of receiving the requested no-action relief, Aetna has agreed to maintain records of ASA transactional activity regarding registered products in the form and for the time period required for broker/dealer books and records under Section 17 of the 1934 Act. Aetna will either provide copies of such records to ALIAC for inspection by appropriate regulatory authorities upon request, or itself make those records available for inspection. By so doing, Aetna in conjunction with ALIAC will provide the necessary audit trail to make certain that all securities transactions are completed and confirmed in accordance with 1934 Act requirements.

In analogous contests, it appears that no-action positions have previously been taken where a financial institution's role was essentially that of a conduit of funds in securities transactions. See, for example, Fidelity Distributors Corp. (available July 13, 1986), Boston Mutual Life Ins. Co. (available January 13, 1972).

In conclusion, we respectfully request that the staff of the Division not recommend that any enforcement action be taken against [\*15] Aetna for failure to register as a broker or dealer under the 1934 Act if it administers the ASA payment facility, particularly with regard to registered securities products, in the manner described in this letter, and if books and records are maintained as described herein.

If you have any questions, please feel free to call the undersigned.

Very truly yours,  
George N. Gingold  
Counsel

**Dreyfus Group Equity Fund, SEC No-Action Letter, LEXIS 1000  
(pub. avail. Jun. 25, 1971)**

In the Dreyfus letter, the staff agreed that broker-dealer registration was unwarranted when Bradford Computer Systems performed clerical and ministerial tasks such as processing investments and redemptions of mutual fund shares, maintaining shareholder records, data processing and mailing shareholder information.

49TH LETTER of Level 1 printed in FULL format.

1971 SEC No-Act. LEXIS 1000

Securities Exchange Act of 1934 - Section 15

Jun 26, 1971

[\*1] The Dreyfus Group Equity Fund, Inc.

TOTAL NUMBER OF LETTERS: 2

SEC-REPLY-1: May 28, 1971

Lawrence M. Greene, General Counsel  
The Dreyfus Corporation  
767 Fifth Avenue  
New York, New York 10022

Dear Mr. Greene:

In your letter dated May 24, 1971, you refer to correspondence with this office and request our concurrence in your opinion that Bradford Computer & Systems, Inc., or its subsidiary, Bradford Mutual Fund Services, Inc. ("Bradford"), may perform services for The Dreyfus Group Equity Fund, Inc. ("the Fund"), without broker-dealer registration.

You state that it is contemplated that Bradford will process investments and redemptions and maintain shareholder records for the Fund and that Bradford will only render services which are "clerical" or "ministerial" in nature, such as data processing, mailings to shareholders, answering shareholder inquiries with respect to accounts, etc. You state that checks for investments may be transmitted to Bradford for record keeping convenience but will be payable to the Bank of New York (the "Bank"), as custodian or to the Fund. Redemption requests will be processed through Bradford but redemption payment will be made by the Fund, the Bank or the underwriter, Dreyfus Sales [\*2] Corporation.

On the basis of your representations that Bradford will not render any services to the Fund other than these of a clerical or ministerial nature, we will not raise any objection because Bradford is not registered as a broker-dealer.

You understand, of course, that this is a staff position, and that it applies only to the arrangement between Bradford and the Fund. The fact that we have indicated that we will not raise any objection or recommend any enforcement action on the basis of the particular facts in this case, should not be understood or construed to be an interpretation that such proposed activity would be in accord with applicable statutory or regulatory provisions.

Sincerely,

Michael Saperstein  
Assistant Chief Counsel

1971 SEC No-Act. LEXIS 1000, \*2

INQUIRY-1: THE DREYFUS CORPORATION  
MANAGERS OF THE DREYFUS FUND INCORPORATED  
THE DREYFUS LEVERAGE FUND INC.  
767 FIFTH AVENUE  
NEW YORK, N.Y. 10022  
935-9300 TELETYPE: 710-581-2755

May 24, 1971

Ezra Weiss, Esq.  
Chief Counsel  
Division of Trading and Markets  
Securities and Exchange Commission  
500 North Capitol Street, N.W.  
Washington, D.C. 20549

Re: The Dreyfus Group Equity Fund, Inc.  
File No. 2-33733

Dear Mr. Weiss:

In further reference [\*3] to the proposed engagement of Bradford Computer & Systems, Inc., or its subsidiary, Bradford Mutual Fund Services, Inc., to process investments and redemptions and maintain shareholder records for The Dreyfus Group Equity Fund, Inc., it is contemplated that Bradford will only render service of a clerical, administrative or ministerial nature, such as data processing, mailings to shareholders, answering inquiries regarding shareholder accounts, and similar matters.

Checks for investments to be made in share of The Dreyfus Group Equity Fund, Inc. may be transmitted to Bradford for record keeping convenience but will be made out to The Bank of New York, as custodian, or The Dreyfus Group Equity Fund Inc. Such checks will be forwarded promptly to the Bank, as custodian. Redemption requests will be processed through Bradford since it maintains all shareholder records, but redemption payments will be made by the Fund, the Bank, or The Dreyfus Sales Corporation, as underwriter.

In the light of the foregoing and in line with your opinion, we believe that the proposed procedure will not require any broker/dealer registration.

Sincerely yours,

Lawrence M. Greene  
General Counsel

**Patrick P. Badamy, M.D., SEC No-Action Letter, LEXIS 1495  
(pub. avail. Apr. 7, 1972)**

In the Badamy letter, the staff recognized that a custodian or trustee under a Keogh Plan does not function as a dealer, underwriter, or fund designee as set forth in Rule 22c-1, but instead as the mutual fund purchaser's agent. As a result, Rule 22c-1 would apply at the fund, underwriter or fund designee level. The staff specifically addressed the fact that payment processing agents would be recommended by a fund and determined that such a recommendation would not change the analysis.

10TH LETTER of Level 1 printed in FULL format.

1972 SEC No-Act. LEXIS 1495

Investment Company Act of 1940 - § 22(c) - Rule 22c-1

Apr 7, 1972

[\*1] Patrick P. Badamy, M.D.

TOTAL NUMBER OF LETTERS: 2

SEC-REPLY-1: Rule 22c-1 under the Investment Company Act of 1940 generally requires that an order for fund shares be priced at the price next computed after receipt of the order by the fund, principal underwriter, dealer or other person authorized to consummate transactions for them. However, if you engage the Keogh custodian or trustee without any recommendation from the fund or its principal underwriter, such custodian or trustee is your agent not the fund's and what it does is a matter of private contract or understanding between you. Even if the Keogh custodian or trustee is one recommended by the fund or its principal underwriter, such custodian or trustee is arguably agent for the purchaser and not the fund. In any event, we have not objected if a custodian or trustee recommended by a fund or its principal underwriter makes the purchase within a reasonable time after receipt, e.g., two business days. You should ask your Keogh custodian or trustee what its practice is.

Alan Rosenblat, Chief Counsel  
Division of Corporate Regulation

February 29, 1972

INQUIRY-1: PATRICK P. BADAMY, M.D.  
175 COOPER RDAD  
ROCHESTER 17, NEW YORK  
CONGRESS 6-0029

Feb 8, 1972

[\*2]  
Securities and Exchange Commission  
Washington, D.C.

Dear Sir:

When one buys a Fund under the Keogh Plan isn't it purchased the day that a check is given and a order is executed? Isn't it teletyped in? Could it be executed at a price for that day it was purchased?

Very truly yours,

Patrick P. Badamy, M.D.

**Consolidated Programs, Inc., SEC No-Action Letter, LEXIS 1771  
(pub. avail. Mar. 22, 1973).**

In the Consolidated Programs, Inc. ("CPI") letter, the staff issued assurances with respect to CPI's proposal to act as agent for individual mutual fund purchasers, receiving their payments for fund share purchases through a computerized billing system and forwarding them to the fund's designated bank. Under CPI's proposal, customers would receive the fund share price next computed after receipt by the fund's bank (22c-1 applied at the bank, not at CPI).



1ST LETTER of Level 1 printed in FULL format.

1973 SEC No-Act. LEXIS 1771

Investment Company Act of 1940 - § 22(c) - Rule 22c-1

Mar 22, 1973

[\*1] Consolidated Programs, Inc.

TOTAL NUMBER OF LETTERS: 2

SEC-REPLY-1: Without necessarily agreeing with all aspects of your legal reasoning, based on the foregoing we will not recommend that the Commission take any action in connection with CPI's proposed computerized billing system, provided that CPI proceeds in reliance on your opinion as counsel that the foregoing arrangement will not violate Section 22(c) of the Investment Company Act of 1940 nor Rule 22c-1 thereunder.

Peter M. Sullivan, Attorney  
Division of Investment Management  
Regulation

FEB 22, 1973

INQUIRY-1: BUTLER, BINION, RICE, COOK & KNAPP  
ATTORNEYS AT LAW  
[ BUILDINGS  
HOUSTON, TEXAS 77002

August 30, 1972

Securities and Exchange Commission  
500 North Capitol Street Northwest  
Washington, D.C. 20549

Re: Consolidated Programs, Inc.

Gentlemen:

This letter and the requests contained in it are submitted on behalf of our client, Consolidated Programs, Inc. ("CPI").

I.

Facts

Identity of CPI. CPI is a Texas corporation headquartered in Houston, Texas. It is registered as a broker and dealer in securities under the Securities Exchange Act of 1934, as amended, and is a member of the National Association of Securities Dealers, Inc. [\*2]

The CPI Billing System. CPI has devised a computerized billing system (the "CPI Billing System") to be used in receiving and disbursing, as instructed,

1973 SEC No-Act. LEXIS 1771, \*2

moneys from individual clients. The CPI System would be used in connection with, but would not be limited to, combined life insurance and mutual fund purchase programs. It is contemplated that moneys would be disbursed to any "qualified recipient" designated by a client. A qualified recipient would be any institution (typically but not necessarily an insurance company or mutual fund custodian) which had entered into an agreement governing the handling or use of money directed to it. It is expected that certain insurance companies affiliated with CPI would be among such qualified recipients. CPI is not presently affiliated with any mutual fund advisor or custodian.

The CPI Billing System would utilize two methods of collecting funds from clients: the "bank draft" method and the "list bill" method.

Under the bank draft method of collection, a check preauthorized by the client would be drawn on the fifth or twentieth day of each month and deposited with the designated qualified recipient.

Under the list bill method of [\*3] collection, CPI would prepare a group billing on the fifth or twentieth day of each month and mail it to the employer of the client, who in turn would remit payment on behalf of all of its employees who were clients of the CPI Billing System. List bill arrangements would be entered into only with employers of a number of clients sufficiently large to make the relationship practical from the standpoint of CPI.

All moneys received by CPI under either of the foregoing collection methods would be transmitted as instructed by the client to the appropriate qualified recipient not later than the close of the business on the day following the day on which such funds were received by CPI. It is contemplated that such transmittal would be by mail. In the case of moneys intended for the purchase of mutual fund shares, the price paid by the customer would be that next computed by the custodian bank after receipt thereof by the custodian bank, as required by Reg. Sec. 270.22c-1 under the Investment Company Act of 1940, as amended ("Rule 22c-1").

## II.

### Requested "No Action" Letter

The purpose of this letter is to inquire as to whether the Staff of the Commission believe that anything [\*4] in the foregoing arrangement would violate Rule 22c-1. Subject to the concurrence of the Staff as requested below, it is our opinion that no violation of the foregoing Rule would be incurred, assuming that each mutual fund custodian bank receiving moneys from any client of CPI would following such receipt comply with Rule 22c-1. This conclusion is based on our understanding that CPI would be acting as agent for its individual clients and would be compensated by its individual clients (or by their employers) and would be performing essentially ministerial duties for its clients in collecting and disbursing their moneys as instructed by them. Any client of CPI would be informed as to the processing time involved in the CPI Billing System.

It is requested that the Staff indicate whether they concur in the conclusions expressed above and whether it is contemplated that the Commission would take any action against CPI by reason of its putting into effect the CPI

1973 SEC No-Act. LEXIS 1771, \*4

Page 5

Billing System as described in this letter.

If any member of the Staff has any question, it is requested that he telephone me collect at (713) 224-6711 in Houston, Texas, or write me at the address indicated above. If a [\*5] personal conference with officers of CPI is desired, I will arrange such a meeting at the convenience of the Staff. The privilege of such a meeting is specifically requested in the event that it is concluded that an affirmative reply to the request for a "no action" letter cannot be given on the basis of this letter.

Yours very truly,

John Moore



## A MEMORANDUM DETAILING THE STRICT REGULATION OF TRS' CARD BUSINESS

This memorandum details the strict regulatory regime under which TRS operates its charge card business. It is submitted as compelling evidence of how TRS must conduct business and handle customer payments carefully and responsibly.

The primary set of federal laws pursuant to which TRS issues and operates its charge card business in the United States is the **Consumer Credit Protection Act** (15 U.S.C.A. §1601 et seq.)(the "Act"). The key provisions of the Act and its implementing regulations are enforceable against TRS, as issuer of the consumer charge card, by the Federal Trade Commission (the "FTC"). The FTC has direct regulatory authority to bring administrative enforcement proceedings against TRS for non-compliance with the Act, and civil money penalties may be imposed under proper circumstances.

The Act is comprised of the following laws:

1. **The Fair Credit Billing Act** (15 U.S.C.A. §1666 et seq.)(**"FCBA"**)

The FCBA contains provisions intended to assure the fair and prompt resolution of billing disputes in consumer credit, along with various other provisions. Significantly, it also contains the requirement that payments received from a consumer be posted promptly to the consumer's account (15 U.S.C.A. §1666c). This requirement is also contained, and expanded upon, in Section 226.10 of Regulation Z.

2. **Truth in Lending Act** (15 U.S.C.A. §1601 et seq.) (**"TILA"**)

The TILA's purpose is to promote the informed use of consumer credit by requiring disclosures about its terms and costs, and it also regulates various credit and charge card practices. It prescribes the content of disclosures to be made in customer agreements, periodic statements, etc.

3. **The Credit and Charge Card Disclosure Act** (15 U.S.C.A. §1637 inter alia)(**"CCCD A"**)

The CCCDA amended the TILA by adding provisions requiring specific disclosures about credit and charge card plans in solicitations and applications for such plans. Its purpose was to enhance the level of information provided to consumers as they consider the purchase of a credit product.

4. **The Equal Credit Opportunity Act (15 U.S.C.A. §1691 et seq.)("ECOA")**

The ECOA prohibits discrimination against protected classes of persons in the extension of credit. Implementing regulations contain provisions intended to assure that prohibited bases are not taken into account at various stages of the credit life cycle (solicitation, application, account management, etc.).

5. **The Fair Credit Reporting Act (15 U.S.C.A. §1681 et seq.)("FCRA")**

The FCRA prescribes the circumstances under which a "consumer report" (as defined in the FCRA) can be obtained. It governs the core business of credit reporting agencies, imposing substantive obligations on both the agencies and the users of consumer reports.

6. **The Electronic Funds Transfer Act (12 U.S.C.A. §4001 et seq., 15 U.S.C.A. §1693)("EFTA")**

The EFTA establishes the rights of consumers in engaging in electronic funds transfers. It provides for various disclosures, as well as for dispute resolution procedures.

Numerous states contain similar consumer credit regulations as well which include laws against improper handling of remittances. Of course, federal law preempts any conflicting regulation at the state level.

~~SECTION 226.10—Prompt Crediting of~~  
~~Payments~~

SECTION 226.10—Prompt Crediting of  
Payments

(a) *General rule.* A creditor shall credit a payment to the consumer's account as of the date of receipt, except when a delay in crediting does not result in a finance or other charge or except as provided in paragraph (b) of this section.

AT AMEX  
we have  
late  
charges  
so NA.

(b) *Specific requirements for payments.* If a creditor specifies, on or with the periodic statement, requirements for the consumer to follow in making payments, but accepts a payment that does not conform to the requirements, the creditor shall credit the payment within five days of receipt.

(c) *Adjustment of account.* If a creditor fails to credit a payment, as required by paragraphs (a) or (b) of this section, in time to avoid the imposition of finance or other charges, the creditor shall adjust the consumer's account so that the charges imposed are credited to the consumer's account during the next billing cycle.

10(a) General Rule

1. *Crediting date.* Section 226.10(a) does not require the creditor to post the payment to the consumer's account on a particular date; the creditor is only required to credit the payment as of the date of receipt.

2. *Date of receipt.* The "date of receipt" is the date that the payment instrument or other means of completing the payment reaches the creditor. For example:

- Payment by check is received when the creditor gets it, not when the funds are collected.
- In a payroll deduction plan in which funds are deposited to an asset account held by the creditor, and from which payments are made periodically to an open-end credit account, payment is received on the date when it is debited to the asset account (rather than on the date of the deposit), provided the payroll deduction method is voluntary and the consumer retains use of the funds until the contractual payment date.
- If the consumer elects to have payment made by a third-party payor such as a financial institution, through a preauthorized payment or telephone bill-payment arrangement, payment is received when the creditor gets the third-party payor's check or other transfer medium, such as an electronic fund transfer, as long as the payment meets the creditor's requirements as specified under section 226.10(b).

# **EXHIBIT Q**

From: Colleen Curran @ IDS on 11/03/98 04:14 PM CST  
To: Louise Parent, Gordon Eid @ IDS, Brian Kleinberg @ IDS, David Hubers @ IDS, Nancy E Jones, Suzanne Crane @ IDS, John Cattau, Joel Allen @ IDS, Tom Joyce @ IDS, Tim Heine, Robert Kraus  
cc: Chip Jones @ IDS, Bob Elconin @ IDS (bcc: Rockell Metcalf)  
Subject: POSITIVE NEWS: UPDATE ON THE MEETING WITH THE SEC REGARDING INVESTING ON THE CARD

**Message from Colleen Curran, Sheri Beck and Rockell Metcalf**

We had a very positive meeting with the SEC. Dick Phillips, our outside counsel, said we couldn't have asked for a better meeting. At the end of the meeting, the SEC senior staff person said that Colleen, as the former deputy chief counsel, could come and meet with her any time.

The SEC complimented us on our presentation and seemed very respectful to working with us to find a way to approve our proposal. They understood the consumer benefits of IOTC. They said that our mutual fund pricing argument was "right on." The SEC continued to be concerned that TRS is not registered as a broker-dealer, with the primary focus on the financial responsibility.

We will contact several of you for additional information to respond to SEC questions. The senior staff person committed to contacting us on the next steps. It's possible the SEC staff will ask us to restructure our proposal as an exemptive order, which would require the approval of the SEC Commission.

We don't have final SEC blessing and this may be a long journey, but we are optimistic we will ultimately achieve success.

As you can tell, we are thrilled with our success at moving the issue forward, although we want to manage your expectations. Thanks again for your enthusiastic support.



# **EXHIBIT R**

VB-34

From: Joan X Prarie @ IDS on 11/05/98 04:56 PM CST  
To: Rockell Metcalf, Sheri Beck @ IDS, Suzanne Crane @ IDS  
cc:  
Subject: Card Billing Statement Mock Up

Attached are two different Card Billing Statement mock up versions. Each version is comprised of 2 pages - Debits and Credits.

The first version includes each line item, how it looks today for PA and how it will look including both products (where applicable). Line descriptions are included below the table.

The second version includes each line item with the information provided only for brokerage. The tables include line number, field name, field description for Investing on the Card, and field explanation.

Let me know if you want any changes - I could easily do them. My telephone number is 612-678-5309.



SEC IOTC Card Statement Desc

Joan

## Investing On The Card

The table shows the current items listed on the Card Billing Statement and the information that will be used for Investing on the Card for Service Establishment Number 5046690186.

### Debits

Line	Privileged Asset Product	Name	Investing on the
1	January 9, 1997*	Date	January 9, 1997*
2	PRIVILIGED ASSETS MINNEAPOLIS MN	Vendor name	AMER EXP SERV CORP. MINNEA
3	JAN CONTRIBUTION	Contribution period	JAN CONTRIBUTION
4	PRIVILIGED ASSETS	Product name	· PRIVILEGED ASSETS – For Privileg · Brokerage Account – For Brokerage P
5	CERTIFICATE # 1234567890	Contract/Acct ID#	CERTIFICATE # 1234567890 – For Priv Brokerage Account Number (eight digit of the nine digit number) – For Brokera
6	FOR INQUIRIES CALL 1-800-633-4003	AESC phone #	FOR INQUIRIES CALL 1-800-633-4003 FOR INQUIRIES CALL 1-800-978-9426
7	Reference: 1234567890 Roc Number: 1234567890	Reference numbers	Reference: Derived Roc

### Explanation of Line Items

The Card Statement Billing Format is the general format used for a merchant file. The Service Establishment number and name is the merchant identifier on TRS Systems. AEFA Systems provides a file to TRS for each Card Billing Cycle. The following information is provided on this file.

Line 1 – Date identifies the billing date. The date is the same for all clients Investing on the Card for a particular bill cycle. The Card System has ten bill cycles each month.

Line 2 – American Express Service Corp is the registered broker-dealer. The field length is limited to 20 characters and is abbreviated to read Amer Exp Serv Corp.

Line 3 – Contribution period indicates the billing period; for example, month or quarter. The word “Contribution” implies the payment is voluntary.

Line 4 – Product name is a variable field and identifies the product the Cardmember is being billed for.

Line 5 – Contract/Acct Identification Number is specific to the client. For brokerage clients the identification number is their brokerage account identification number.

Line 6 – AESC telephone number is a 1-800-number the client may call for service issues related to their Amer Exp Serv Corp Card billings. The service areas are staffed with AESC service associate employees. All brokerage related issues are serviced by brokerage service representatives.

Line 7 – These numbers are reference numbers and appear to be derived based on the Contract/Acct ID#.

### Credits – Version 1

Line	Privileged Asset Product	Name	Investing on the
1	January 9, 1997	Date	No Change
2	PRIVILIGED ASSETS ADJUSTMENT	Vendor Name	AMER EXP SERV CORP ADJUSTME

### Credits – Version 2

Line	Privileged Asset Product	Name	Investing on the
1	January 9, 1997	Date	No Change
2	ADJUSTMENT FOR PRIVILIGED ASSETS	Vendor Name	ADJUSTMENT FOR AMER EXP SER

### Explanation of Credits Version 1 and Version 2

Version 1: The first adjustment is made by PA CSO. A selective group within the PA CSO have access to the Card System and have authority to credit the Cardmember's account for adjustments related to their Amer Exp

Serv Corp billings and transactions. These adjustments are made as a result of a customer service call from a client.

Version 2: The second adjustment is generated by the TPNS Script (a TRS system). The TPNS adjustment is made to remove American Express Service Corp amounts "past due" to avoid a Cardmember receiving a late payment notice for this elective payment. The adjustment is made within 60 days of the non-payment. The TPNS adjustment is done through "script" and results in a letter being generated to the Cardmember/Client advising them of a credit in \$xxx.xx being issued to their Card account.

### Investing On The Card

The table describes the information included on the Card Billing Statement for Investing on the Card. The Card Statement Billing Format is the general format used for a merchant file. The Service Establishment number and name is the merchant identifier on TRS Systems. AEFA Systems provides a file to TRS for each Card Billing Cycle.

#### Debits

Line	Field Name	Field Description for Investing on the Card	Field
1	Date	January 9, 1997*	Date identifies the billing date Investing on the Card for a pa has ten bill cycles each month
2	Vendor name/location	AMER EXP SERV CORP. MINNEAPOLIS MN	American Express Service Co field length is limited to 20 ch Amer Exp Serv Corp.
3	Contribution period	JAN CONTRIBUTION	Contribution period indicates or quarter. The word "Contri voluntary.
4	Product name	· Brokerage Account	Product name is a variable fie Cardmember is being billed f Funds the product name is "b
5	Contract/Acct ID#	Brokerage Account Number (eight digit identifier, first eight digits of the nine digit number)	Contract/Acct Identification N brokerage clients the identific account identification number
6	AESC phone #	FOR INQUIRIES CALL 1-800-978-9426	AESC telephone number is a service issues related to their billings. The service areas ar employees. All brokerage rel service representatives.
7	Reference numbers	Reference: Derived                      Roc Number: Derived	These numbers are reference based on the Contract/Acct I

*Credits – Version 1*

Line	Field Name	Field Description for Investing on the Card	Fiel
1	Date	January 9, 1997	Date identifies the date the ad System.
2	Vendor Name	AMER EXP SERV CORP ADJUSTMENT	This adjustment is made by within the Privileged Asset System and have authority account for adjustments rel Service Corp billings and t made as a result of custom

*Credits – Version 2*

Line	Field Name	Field Description for Investing on the Card	Fiel
1	Date	January 9, 1997	Date identifies the date the ad System.
2	Vendor Name	ADJUSTMENT FOR AMER EXP SERV CORP	This adjustment is generate system). The TPNS adjust Express Service Corp amo Cardmember receiving a la payment. The adjustment i non-payment. The TPNS and results in a letter being Cardmember/Client advisi being issued to their Card

# **EXHIBIT S**

**From:** Patrice Jacobson <Patrice.Jacobson@aexp.com>  
**To:** "Hsobelman%swlaw.com" <Hsobelman@swlaw.com>  
**Date:** 11/10/98 8:20am  
**Subject:** Investing on the Card

Howard - Hope all is well. Colleen Curran gave the okay to do the search relating to Investing on the Card so please let it roll. Thanks, Patrice  
----- Forwarded by Patrice Jacobson on 11/10/98 10:31 AM  
-----

**From:** Colleen Curran @ IDS on 11/10/98 09:21 AM CST  
**To:** Patrice Jacobson  
**cc:** Rockell Metcalf  
**Subject:** Investing on the Card

Patrice, this sounds fine to me. Would you let Howard know that is ok? Rockell is starting the work of putting together the response to the patent questionnaire, so you should contact him about that stuff going forward. Thanks.

----- Forwarded by Colleen Curran on 11/10/98 09:11 AM  
-----

Patrice Jacobson @ AMEX  
11/09/98 10:18 AM EST  
**To:** Colleen Curran  
**cc:**  
**Subject:** Investing on the Card

Colleen - I am not sure if you have spoken to Howard Sobelman or Michael Kelly of Snell & Wilmer on this matter. Howard feels that conducting a clearance search should be done for the reason mentioned below. Please let me know as soon as possible if you wish to proceed OR you can contact Howard directly at (602) 382-6228 if you have any additional questions. Either way please let me know if you wish to proceed with a clearance search. Thanks, Patrice

PS - It was great to see you last week!!! You look terrific!!!!  
----- Forwarded by Patrice Jacobson on 11/09/98 10:18 AM  
-----

**From:** Sobelmh%swlaw.com @ Internet on 11/07/98 12:15 AM MST  
**To:** Patrice Jacobson  
**cc:** dmier%swlaw.com @ Internet, mkelly%swlaw.com @ Internet  
**Subject:** Investing on the Card

Patrice:

I reviewed the materials for "Investing on the Card" and i recommend conducting a clearance search to determine if any third party rights cover any aspects of the system. The clearance search should be around \$3-4,000.



I will not proceed until i receive your approval.

thanks.

Howard

\*\*\*\*\*

Howard I. Sobelman  
Snell & Wilmer L.L.P.  
One Arizona Center  
400 E. Van Buren  
Phoenix, AZ 85004-0001  
(602) 382-6228  
Fax: (602) 382-6070

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# **EXHIBIT T**

**L.L.P.**  
**LAW OFFICES**  
One Arizona Center  
Phoenix, Arizona 85004-0001  
(602) 382-6000  
Fax: (602) 382-6070

SALT LAKE CITY, UTAH

Time In

## Time Out

PLEASE DELIVER THE FOLLOWING MATERIAL AS SOON AS POSSIBLE

**TO:**

FACSIMILE NUMBER:

**Robert McCabe 800/357-9995**

**TO:**

**FACSIMILE NUMBER:**

**FROM:**

**Howard I. Sobelman**

REMARKS:

**NEW CLEARANCE SEARCH REQUEST**

ORIGINAL DOCUMENT: Will not be sent VIA FACSIMILE ONLY

**CONFIRMATION No.:**  
**(IF REQUIRED)**

NUMBER OF PAGES:  
(INCL. COVER PAGE)

**DATE: November 11, 1998**

**CLIENT/ MATTER: 10655.0208**

**PLEASE RETURN TO: Debbie Mier (16s02)**

PERSONAL FAX: No

REQUEST/ATTORNEY: Howard I. Sobelman

**DIRECT LINE: 602/382-6228**

**IF YOU HAVE NOT PROPERLY RECEIVED THIS TELECOPY  
PLEASE CALL US AT (602) 382-6075  
OUR FACSIMILE NUMBER IS (602) 382-6070**

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**Snell & Wilmer**  
— L.L.P. —  
LAW OFFICES

One Arizona Center  
Phoenix, Arizona 85004-0001  
(602) 382-6000  
Fax: (602) 382-6070

PHOENIX, ARIZONA

TUCSON, ARIZONA

IRVINE, CALIFORNIA

SALT LAKE CITY, UTAH

Howard I. Sobelman (602) 382-6228  
Patents, Trademarks & Copyrights  
Internet: hsobelman@swlaw.com

November 11, 1998

**VIA FACSIMILE ONLY**

Robert McCabe  
Washington Patent Services Corp.  
Crystal Park III  
2231 Crystal Drive, Suite 500  
Arlington, VA 22202

Re: Clearance Search for "INVESTMENT PAYMENT METHOD"  
Our File No.: 10655.0271

Dear Bob:

Please conduct a clearance (right to use) search for a "Investment Payment Method". I would appreciate receiving the results of this search in my office no later than **November 18, 1998**.

This system includes an existing chargecard system, such as the American Express Chargecard billing system, in which a consumer uses a chargecard to purchase products and then the consumer receives a billing statement at the end of each month including all the charges for that month. The consumer then sends a payment for all the charges for the particular month to the chargecard administrator. Under the improved system, a chargecard holder appoints the chargecard administrator as a processing agent to collect and promptly remit the consumer's voluntary, periodic payments for mutual fund shares or variable annuity products. Prior to beginning the investing arrangement with the chargecard administrator, the consumer notifies the broker of the amount he intends to invest on a monthly basis and the specific funds for the variable annuity selections, including the allocation of investment amounts to each investment. The consumer's intended investment amount is reflected on his chargecard billing statement as a reminder to remit the investment amount along with the normal chargecard payment.

After receiving his statement, the consumer sends a single check for both regular chargecard purchases and for the purchase of investments such as, for example, mutual fund shares. When the consumer payment is received by the chargecard administrator, a payment processing system determines, based on the consumer's

Robert McCabe  
November 11, 1998  
Page 2

preselected investments, how the consumer's payment should be allocated between regular chargecard payments and investment amounts, then the payment processing system electronically forwards the appropriate investment amount to the broker for investing. The administrator of the chargecard does not hold or control the investment funds because the administrator only handles the funds pursuant to the consumer's directions to transfer the funds.

The price on the consumer's mutual fund shares is computed after receipt of the consumer's order by the broker and sent to the consumer. The consumer may make withdrawals and changes to his brokerage account or terminate participation in the service by calling a toll free number. Since each investment is voluntary, non-payment of the investment amount will not effect the consumer's ability to charge on the chargecard and unpaid investment amounts will not accrue interest or other charges. The consumers are not exposed to any risk of loss by using the chargecard administrator as a processing agent for their intended investment amounts because the chargecard administrator will take full responsibility for the safety of the funds from the time the intended investment amount is received by the chargecard administrator.

**PLEASE CONFIRM RECEIPT OF THIS CLEARANCE SEARCH REQUEST AND THE COMPLETION DEADLINE.** If you have any questions regarding this system or this search, please do not hesitate to call.

Sincerely,

SNELL & WILMER LLP

Howard I. Sobelman

HIS:dm

# **EXHIBIT U**

# Washington Patent Services Corporation

Professional Patent Searching in the United States Patent and Trademark Office Since 1980

**Toll Free telephone**

1-800-654-7322

Crystal Park III

2231 Crystal Drive - Suite 500  
Arlington, VA 22202

**Toll Free facsimile**

1-800-357-9995

E-mail: [searchers@washpat.com](mailto:searchers@washpat.com)

November 17, 1998

Howard I. Sobelman  
Snell & Wilmer, L.L.P.  
One Arizona Center  
Phoenix, Arizona 850004-0001

In re: *SearchPlus* Clearance Search  
Invention: Investment Payment Method  
Your Reference: 10655.0271  
Our Docket: 98276

Dear Mr. Sobelman:

Pursuant to your request, a *SearchPlus* Clearance search has been conducted through the official records and files of the U.S. Patent and Trademark Office. The search was directed to a charge card system that incorporates an investment plan as fully described in your provided disclosure. The search was conducted manually in the Public Search Room and also through selected files in the Examiner Search Rooms. Computer databases were also investigated to assure a thorough search.

## **SEARCH AREAS**

While numerous subclasses may have been partially investigated, the most relevant search areas included the following class(es)/subclass(es): 705/14; 705/17; 705/35; 705/37; 705/39; and 705/40.

## **SEARCH RESULTS**

As a result of the utility search, the following U.S. documents, copies of which are provided herewith, were located:

**5,787,404-** discloses a system in which a credit card is used in conjunction with a retirement fund where an option of making monthly contribution to the fund with the monthly card payment.

**5,761,650-** discloses a system and method of generating billing statements with message inserting and detailed charges incurring over billing cycles.

**5,745,706-** discloses a method for managing an investment and spending account, so as to achieve selected guidelines for spending flexibility and investment returns.

5,717,989	5,483,445	5,262,942	4,823,265	4,751,640
4,694,397	4,597,046			

As a result of the design search, the following U.S. patent documents, copies of which are provided herewith, were located:

No relevant design patents were located.

As a result of the foreign publications search, the following Patent Cooperation Treaty/European Patent Office patent documents, copies of which are provided herewith, were located:

No relevant foreign patents were located.

\*\*\*

Please feel free to contact us if you have any questions regarding the search. Thank you for using our services.

Warm regards,

  
Robert McCabe



# **EXHIBIT V**

# Snell & Wilmer

L.L.P.  
LAW OFFICES

One Arizona Center  
Phoenix, Arizona 85004-0001  
(602) 382-6000  
Fax: (602) 382-6070

PHOENIX, ARIZONA

TUCSON, ARIZONA

IRVINE, CALIFORNIA

SALT LAKE CITY, UTAH

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8021 1372 8867

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Howard I. Sobelman (602) 382-6228  
Patents, Trademarks & Copyrights  
Internet: hsobelman@swlaw.com

December 8, 1998

## VIA FEDERAL EXPRESS

## ATTORNEY/CLIENT PRIVILEGED CONFIDENTIAL COMMUNICATION

Ms. Patrice Jacobson, Manager  
General Counsel's Office  
AMERICAN EXPRESS TRS  
American Express Tower  
World Financial Center  
New York, NY 10285-4900

Re: Investing on the Card  
Our Ref. No.: 10655.0271

Dear Patrice:

Per your request, we have conducted a clearance search for the "Investing on the Card" system. Briefly, [REDACTED]

However, this analysis is limited to the TRS Investing On the Card System and does not analyze the services provided by American Express Service Corporation.

In conducting this search and analysis, we relied upon a letter submitted by American Express TRS to the Securities and Exchange Commission dated September 8, 1998 which describes the operation of the Investing On the Card System. In general, the system incorporates the American Express Chargecard billing system, in which a consumer uses a chargecard to purchase products and then the consumer receives a billing statement at the end of each month which includes all of the charges for that month. The consumer then sends a payment for all the charges to American Express. Under the improved system, a cardmember appoints American Express as a processing agent to collect and promptly remit the cardmember's voluntary, periodic payments for mutual fund shares or variable annuity products to American Express Service Corporation (AESC) which is a registered broker-dealer who distributes various investment products.

# **EXHIBIT W**



January 6, 1999

**American Express**  
General Counsel's Office  
World Financial Center  
New York, NY 10285-4900

Howard I. Sobelman, Esq.  
Snell & Wilmer  
One Arizona Center  
Phoenix, Arizona 85004-0001



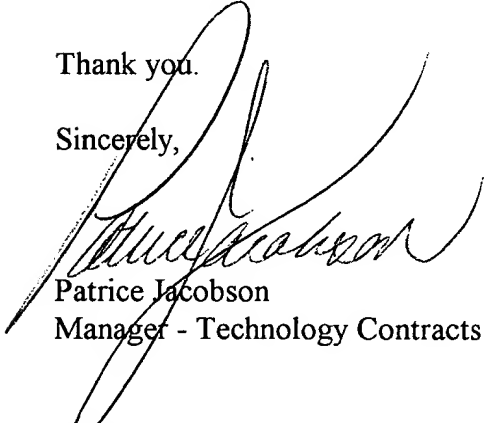
RE: Investing on the Card

Dear Howard:

Attached please find a completed Patent Checklist form along with a completed New Invention Disclosure form. Please review and let me know if you have any questions. If necessary, feel free to contact Rockell Metcalf of the General Counsel's Office here in New York at (212) 640-5760 for additional information.

Thank you.

Sincerely,

  
Patrice Jacobson  
Manager - Technology Contracts

cc: Rockell Metcalf

Attachments

# **EXHIBIT X**

American Express Company  
American Express Tower  
World Financial Center  
New York, New York 10285



January 11, 1999

Mr. Stephen J. Steichen  
Senior Vice President - Finpro  
J&H Marsh and McLennan  
333 South 7<sup>th</sup> Street, Suite 1600  
Minneapolis, MN 55402-2400

Dear Steve,

Thank you and Ted for continuing to work diligently on the TRS surety need.  
Attached is four copies of:

- American Express Company 1997 Annual reports
- American Express Company third quarter 10q reports

We are still working on obtaining TRS Audited Financials for year ended 1997. We expect to have them to you by Wednesday, January 13, 1999.

Please call me if you need other information from me. My understanding is that Rockell Metcalf, Esquire, is sending a copy of the no action request letter to your attention and you are sending the following information to Rockell and myself...

- Copy of regulation governing banks for 401K money they are in custody of prior to investing it (2 items).
- Copy of bond forms that are applicable

On Friday January 15 Ted and Rockell and yourself are meeting at Rockell's Minneapolis office (IDS Tower Floor 27) to finalize the bond form wording. After the meeting we will need to discuss and agree on the next steps.

Very truly yours,

A handwritten signature in cursive script that reads "Andrew E. Nottestad".

Andrew E. Nottestad

cc R. Metcalf  
K. Gee

# **EXHIBIT Y**

American Express  
7<sup>th</sup> Avenue South  
Minneapolis, MN



Phone: (612) 678-1343  
E-Mail: Nancy Simmons

## MEMORANDUM

Date: March 5, 1999  
City: Minneapolis  
Office: Minneapolis, MN

**SUBJECT:** Request for Approval of Project Definition Report  
Invest on the Card Point of Arrival

**Project ID #:** P0030627

**TO:** Invest on the Card Project Team

**FROM:** Nancy Simmons

Attached is the Project Definition Report (PDR) for the Invest on the Card Point of Arrival project.

This document is intended for sign off by the designated signatories. Please review the document for accuracy and forward your approval and/or comments to me by March 15, 1999. Only the sign off pages need be returned to me. Once the signatures are received, we will conclude the Project Definition Phase and continue with the Analysis Phase.

If you have any questions or concerns, please contact me at the above number.

Nancy Simmons  
IOTC-POA Project Manager





# Invest on the Card Point of Arrival Project Definition Report

*Project ID# P0030627*

**FINAL DRAFT**

---

Date Published:	02/16/99
Date Revised:	03/04/99

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Development Contract Number:	Date Created:	January, 1999
Project Name:	Investing on the Card - POA	
Project MR Unit:	5123	

# **EXHIBIT Z**



American Express Financial Advisors Inc.  
IDS Tower 10  
Minneapolis, Minnesota 55440

Financial  
Advisors

# Facsimile Cover Sheet

Date 4-16  
Pages, including cover sheet: 11

To: Howard Silverman

From:

- ☐ Nancy Jones (612) 671-4671
  - ☐ Jeni Hofstede-Bryan (612) 671-1348
  - ☐ Joel Allen (612) 671-4693
  - ☐ Barbara Norrgard (612) 671-2689
  - ☒ Suzanne Crane (612) 671-3741
  - ☐ Spenser Segal (612) 678-2174
  - ☐ Mark Moller (612) 671-0717
  - ☐ Yedda Marks (612) 678-1359
  - ☐ Marty Anderson (612) 671-1890
  - ☐ Arvind Sharma (612) 678-1363
  - ☐ Eric Havir (612) 671-2542
  - ☐ Tamara Parrilli (612) 678-2360
  - ☐ Howard Weinberger (612) 678-1333
  - ☐ Sally Cooper (612) 671-6293
  - ☐ George Lawton (612) 671-6956
  - ☐ Marcy Keckler (612) 671-4195
- Fax Number (612) 671-0505

Phone: 602-382-6228

Fax Number: 602 382 6228

CC: 6070

Remarks: ☐ Urgent ☐ Confidential ☐ Reply ASAP ☒ For Your Review ☐ Please Comment

The additional ~~to~~ documents  
we discussed today.

If you did not receive all pages, please call (612) 671-1348. Thank you!

# Investing on the Card: Mutual Funds Receive Cardmember Remittance

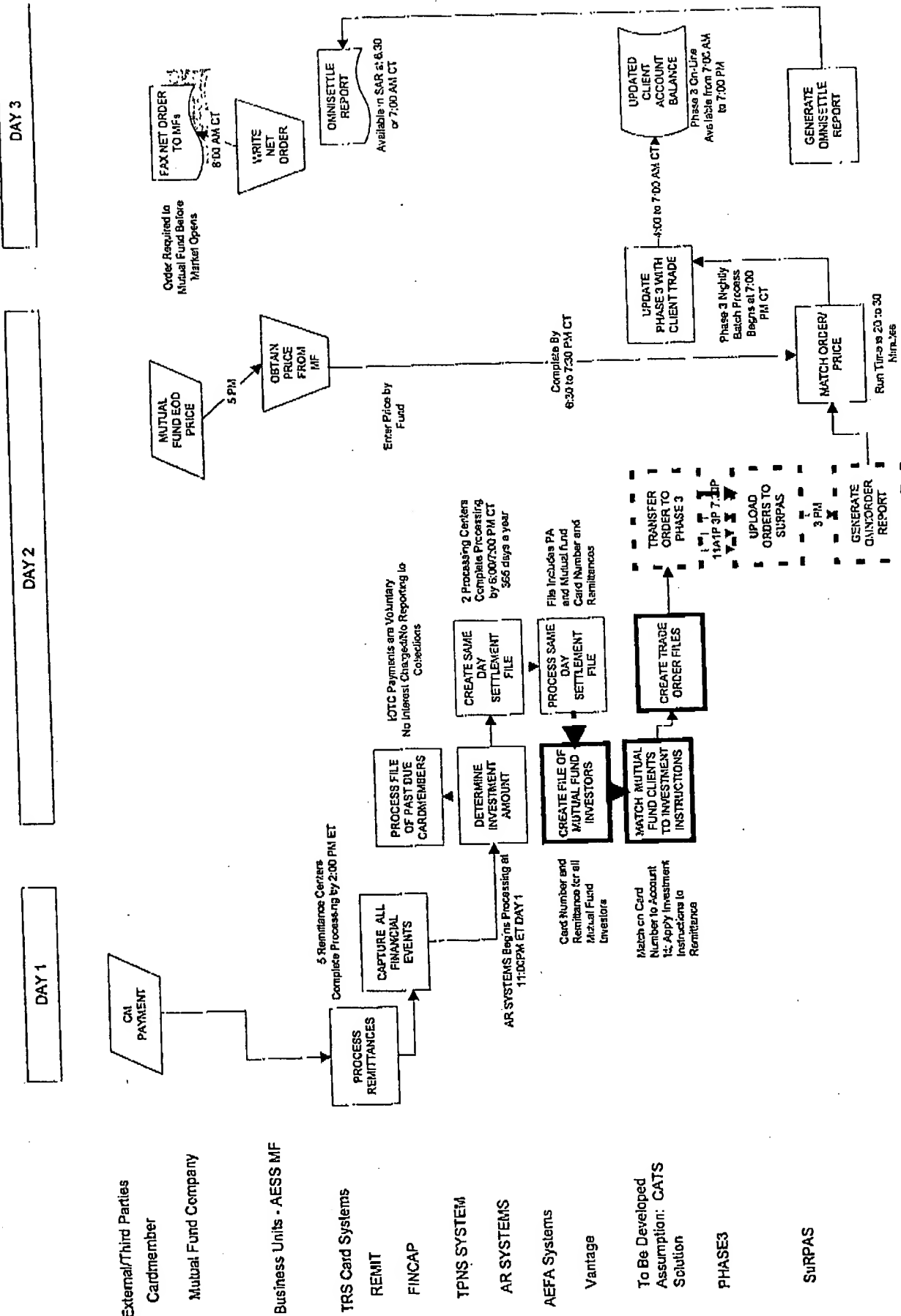
9/29/98

P. 08

FAX NO. 6126710505

APR-16-99 FRI 02:23 PM AMERICAN EXPRESS

LA/ESS/PROJECT/Support/Analyze/Line of Visibility Business Models.vsd



Page 7

9/29/98

AEFD CONFIDENTIAL

Figure 5

# **EXHIBIT AA**

**From:** HOWARD SOBELMAN  
**To:** inet:suzanne.crane@aexp.com  
**Date:** 4/21/99 5:05pm  
**Subject:** IOTC patent

page 54, PA functionality flow diagram, step 11.5  
-- what is a savings balance? does it just store the amount billed to a cardmember?

IOTC: Mutual Funds....Bill Cardmember Flowchart  
-- what does ROC, CAP and PREMIUM BILLING "TRANS REG" each stand for?

thx.....

\*\*\*\*\*

Howard I. Sobelman, Esq.  
SNELL & WILMER L.L.P.  
One Arizona Center  
400 E. Van Buren  
Phoenix, AZ 85004-0001  
(602) 382-6228  
Fax (602) 382-6070

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# **EXHIBIT BB**

**From:** Suzanne Crane <Suzanne.Crane@aexp.com>  
**To:** "Sobelmh%swlaw.com" <Sobelmh@swlaw.com>  
**Date:** 4/28/99 9:10am  
**Subject:** Re: IOTC patent

Howard, I just learned more about the Vantage system on an IOTC meeting for Triumph that want to make sure your aware of.

Vantage is a vendor product. We manipulate the code, but if we create a new "modual" they find useful, they apparently can take it and sell it off. We share in the proceeds if they do. For the market test effort, Vantage will be adding the funcitonality of "splitting" the file from TRS, sending the non-PA accounts to the new CATS screen.

In addition, we are wrapping up our conceptual design for the Triumph system (new card system). We are on track for an April 2000 implementation of IOTC on the Triumph system. To be on the new card system, the Card is building a new module for "non-financial" billing...or billing that does not become a card member obligation to pay. AEFA will be building or truely expanding the exisiting CATS sytem to handle multiple AEFA product billings to one Card. Currently, we can only bill on a one to one ratio.

I want to point this out because I want to make sure your aware of the whole picture. The intial form was market test info only, with references to the fact we were in the process of working with Triumph to get on the agenda and have an additional effort in 1999.

**CC:** Rockell Metcalf <Rockell.Metcalf@aexp.com>

**From:** Suzanne Crane <Suzanne.Crane@aexp.com>  
**To:** "Sobelmh%swlaw.com" <Sobelmh@swlaw.com>  
**Date:** 4/28/99 8:23am  
**Subject:** Re: IOTC patent

I apologize for the delay. Your questions:

page 54, PA functionality flow diagram, step 11.5

-- what is a savings balance? does it just store the amount billed to a cardmember?

Response: Savings balance refers to the "PA or IOTC" balance on the card. It includes the Billed, Received, and Outstanding amounts. The term savings balance is used because PA was launched under "Savings on the Card"

IOTC: Mutual Funds....Bill Cardmember Flowchart

-- what does ROC, CAP and PREMIUM BILLING "TRANS REG" each stand for?

1. On the card statement ROC refers to Record Of Charge

2. Premium Billing Tran Reg refers to American Express Premium Billing Transmittal Register

( A report that Provides a Summary by CAP Number and SE Number of Number of Records and Amounts Included for Billing for Each Billing Cycle.)

3. CAP--

Service Establishment (S/E) number:

This number identifies an individual establishment that services a card member

- eg: Dayton,s downtown Mpls store

TRS also calls this a Merchant Number.

Primarily used throughout the TRS systems for grouping and reporting

Central Affiliated Property (CAP) number:

This number is similar to an S/E number, but it identifies the overall company

- eg: Dayton Hudson Company

Relationship between CAP numbers and S/E numbers:

TRS maintains the relationship within their file of S/E numbers as cross references

S/E numbers sometimes equal CAP numbers. They are most likely to equal in the events of:

- Only one service establishment for the overall company

- The main headquarters service establishment of the overall company (eg: Dayton,s Mpls)

Preference is to not use the same number for both (for clarity)

Use of CAP numbers:

- In the Card billing process only.
- S/E Payable

Use of S/E numbers:

- In the Card Billing process.
    - Vantage (and soon to be CATS too)
    - FINCAP
    - AR/Billing
    - S/E Payable
    - TPNS Script
  - In the Card Remittance process.
    - REMIT
    - FINCAP
    - Savings Balance File
    - AR/???
    - TPNS Script
    - Same Day Settlement File
- QUEST: What other systems? (Review Joan,s diagrams, ask

Terry)

thx.....

# **EXHIBIT CC**

**From:** Suzanne Crane <Suzanne.Crane@aexp.com>  
**To:** "SOBELMH%swlaw.com" <Sobelmh@swlaw.com>  
**Date:** 4/28/99 9:15am  
**Subject:** Re: PDR

Howard, for your reference and reading pleasure. Here is the PDR for the 1999 IOTC development effort. The flow charts you have still apply, but some of the system (i.e. Card legacy to Triumph) will change.

----- Forwarded by Suzanne Crane on 04/28/99 11:01 AM  
-----

Nancy L Simmons  
04/09/99 09:41 AM  
**To:** Suzanne Crane @ AMEX  
**cc:**  
**Subject:** Re: PDR

----- Forwarded by Nancy L Simmons on 04/09/99 09:48 AM  
-----

Suzanne Crane  
04/09/99 09:45 AM  
**To:** Nancy L Simmons@AMEX  
**cc:**  
**Subject:** Re: PDR

Looks good. Can you send me the most recent version. I will have take to NY and get signatures/review if needed there. I don't think we really need official sign off from them, but we need to figure out how to secure technology resources. Anyways, I'll take the PDR and give them copies if they desire and discuss the overall process with them.

# **EXHIBIT DD**

# Snell & Wilmer

L.L.P.  
LAW OFFICES

One Arizona Center  
Phoenix, Arizona 85004-0001  
(602) 382-6000  
Fax: (602) 382-6070

PHOENIX, ARIZONA

TUCSON, ARIZONA

IRVINE, CALIFORNIA

SALT LAKE CITY, UTAH

Howard I. Sobelman (602) 382-6228

Patents, Trademarks & Copyrights

Internet: hsobelman@swlaw.com

April 30, 1999

## VIA FEDERAL EXPRESS

**FedEx**

8115	6597	2287	Form ID No. 0205
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FedEx Tracking Number — PULL UP PURPLE TAB

Suzanne Crane  
AMERICAN EXPRESS FINANCIAL ADVISORS INC.  
IDS Tower 10  
Minneapolis, MN 55440

Re: Title: SYSTEM AND METHOD FOR DIVIDING A  
REMITTANCE AND DISTRIBUTING A  
PORTION OF THE FUNDS TO MULTIPLE  
INVESTMENT PRODUCTS

Our Docket No.: 10655.7700

Dear Suzanne:

I am enclosing a draft of the subject patent application for your review. Please read over the entire application very carefully to ensure that it provides a technically accurate and complete description of the invention. The description should be sufficiently complete to enable someone of ordinary skill in the art (e.g., the average practitioner in the technological field of the invention) to make and use the invention. Additionally, please ensure that the best mode of the invention, as you now know it, is disclosed.

After you have reviewed the enclosed draft, please contact me so that we may discuss any comments, changes and/or additions you may have to the application.

Sincerely,

SNELL & WILMER, L.L.P.

Howard I. Sobelman

HIS:dm

Enclosure

cc: Rockell Metcalf (via facsimile w/o encl.)  
Robert Miller (via facsimile w/o encl.)  
Patrice Jacobson (via facsimile w/o encl.)

Sobelman\PHX\656716.01



# **EXHIBIT EE**

[Click here and type address]

## facsimile transmittal

✓ To: Howard Sobelman

Fax: 602-382-6070

Snell &amp; Wilmer

To: Rockell Metcalf AEFA, NY

Fax: 619-

From: Suzanne ~~C~~irane

Date: 05/27/99

612 671-3241

Re: Patent forms for IOTC

Pages: 32

CC: [Click here and type name]

☐ Urgent☒ For Review☐ Please Comment☐ Please Reply☐ Please Recycle

I promised a completed review...but we are ALMOST done...made it to page 21, and will send the remainder next week. I'm sending what we have as a starter. There is confusion over the "billing" system, and we've made notes and sent 5 other process flows to make sure we've given you all the correct information.

Please add: Mark Sweazy to the Inventors List. Mark is also a good contact for you to check in with Howard if you have really really technical questions. His phone number is 612-671-8921. I'm working from home Friday, but please feel free to call 612-535-9877.

Trade Database 30 left in b/c documents describe its function  
& changed to optional feature  
suitably obtains/transmits includes manual or auto

# **EXHIBIT FF**

10655. 7700

**From:** Howard Sobelman  
**To:** inet:suzanne.crane@aexp.com, inet:rockell.metcalf@...  
**Date:** 10/5/99 10:50am  
**Subject:** IOTC revised patent application

Suzanne:

As discussed, please review the revised draft and let me know if we need to use the new flowcharts. Also, we previously discussed that AMEX will be filing for copyright registration for the code. Has AMEX completed the filing?

As planned, we will discuss your comments tomorrow at 11am (MN time).....thx

<WP Attachment Enclosed>

\*\*\*\*\*

Howard I. Sobelman, Esq.  
SNELL & WILMER L.L.P.  
One Arizona Center  
400 E. Van Buren  
Phoenix, AZ 85004-0001  
(602) 382-6228  
Fax (602) 382-6070

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CC: mierd

# **EXHIBIT GG**

**From:** Howard Sobelman  
**To:** mied  
**Date:** 10/11/99 8:32am  
**Subject:** Addresses -Forwarded

please prepare all documents and fax out early as possible today and request  
fax signatures back.....

**From:** "Suzanne Crane" <Suzanne.Crane@aexp.com>  
**To:** "SOBELMH@swlaw.com" <SOBELMH@swlaw.com>  
**Date:** 10/11/99 6:32am  
**Subject:** Addresses

Here ya go!

Suzanne P Crane  
5249 Pennsylvania Ave N  
New Hope MN 55428

Marcus Sheire  
1540 Osceola Ave  
St Paul, MN 55105

Mark D Sweazy  
11219 South Oakvale Road  
Minnetonka, MN 55305

Bonnie Schlegel  
543 84th Circle NW  
Coon Rapids, MN 55333

Joan is the consultant, so we are sending both her work and home address incase you need them.

Home: Joan Prairie  
2715 West 28th Street  
Minneapolis, MN 55416

Work: Joan Prairie  
4620 West 77th Street  
Edina, MN 55435-4978

From: "Suzanne Crane" <Suzanne.Crane@aexp.com>  
To: "SOBELMH%swlaw.com" <SOBELMH@swlaw.com>  
Date: 10/11/99 6:25am  
Subject: Re: IOTC revised patent application -Reply

I'm sorry. Our server went down and I was unable to get on Friday.

1. I have the addresses as of this morning and will email them ASAP.
2. You have all the comments. Mark Sweazy is the only other person with comments, he sent you a long note. I think the rest of us were ok with your interpretation of the data entity diagram, because we were viewing it a more general business level...the idea vs the detailed technical flow. Mark is a systems designer and concerned about the legal ramifications if it is incorrect and later someone challenges. (not that I'm not concerned with, but I read the patent differently than him!)

3. I'll forward Rockell a readable version of the patent for our computers.

----- Forwarded by Suzanne Crane on 10/11/99 08:05 AM  
-----

SOBELMH%swlaw.com@Internet  
10/08/99 10:20 AM  
To: Suzanne Crane@AMEX  
cc: Rockell Metcalf@MailHub1  
Subject: Re: IOTC revised patent application -Reply

please let me know when i have received all of the comments (i do not know how many people are reviewing the document).....i cannot finalize the declarations, etc. until i fully edit the document because after the declarations are signed, we cannot make any more changes.....thx

\*\*\*\*\*  
Howard I. Sobelman, Esq.  
SNELL & WILMER L.L.P.  
One Arizona Center  
400 E. Van Buren  
Phoenix, AZ 85004-0001  
(602) 382-6228  
Fax (602) 382-6070

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>>> "Suzanne Crane" <Suzanne.Crane@aexp.com> 10/08/99 08:10am

>>>

I'm still awaiting two addresses, I'll send the asap when I get them all. I instructed people to send comments directly to you Howard via Notes and copy me to save time. I reminded them this morning to do this TODAY!! And to confirm if they had no comments, which I expect from two of the people.

Rockell, Howard has my comments so you can give it a read now if you feel. I can't tell how much comments the other people are going to have. They had a lot the first time, but Howard did a great job adjusting for them.

CC: "Rockell Metcalf" <Rockell.Metcalf@aexp.com>

106SS.7760

**From:** Howard Sobelman  
**To:** I-Mail.SMTP("Mark.D.Sweazy@aexp.com")  
**Date:** 10/8/99 3:54pm  
**Subject:** Comments on IOTC Patent Application -Reply

thx for the comments. unfortunately, when i started drafting the application, those are the only figures that existed. I would like to have a teleconference with you on Mon or Tues so i can explain the reasons certain sections are drafted in certain ways and discuss your edits....

i am NOT available:  
Mon 130-2 (AZ time)  
Tues 9-2 (AZ time)

Let me know what works for you.....

thx

\*\*\*\*\*

Howard I. Sobelman, Esq.  
SNELL & WILMER L.L.P.  
One Arizona Center  
400 E. Van Buren  
Phoenix, AZ 85004-0001  
(602) 382-6228  
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CC: mierd

**From:** "Mark D Sweazy" <Mark.D.Sweazy@aexp.com>  
**To:** "Sobelmh%swlaw.com" <Sobelmh@swlaw.com>  
**Date:** 10/8/99 3:41pm  
**Subject:** Comments on IOTC Patent Application

I'm sorry for the late response, but I've been struggling with this as you'll see below. After you read my notes, please contact me and let me know how I can help get this done in the quickest and least painful manner. I'd be happy to block off a chunk of next week to work on this if that is what is needed.

There are a lot of ways to describe these functions and the systems that support them, including process flows, system diagrams, and logical data models. Unfortunately, describing them in terms of a patent application is new to me and I'm having trouble differentiating between what might be an error versus what is the normal way of describing something in the patent world. So, I'll do the best I can given my ignorance. Here are my main 2 concerns:

First, I'm still having trouble with the accuracy and clarity of the diagrams that get referred to so much in the text. In particular, I'm uncomfortable with how we are describing physical constructs (databases, etc) while referring to a logical data model. In many cases, the logical entities shown as rectangles on figure 2 are subsequently being referred to as physical databases, when in fact some of them are not. In fact, the very nature of logical data models means that you can have an entire page of data constructs and their relationships to each other that otherwise might translate into a single database. I believe this is the case with figure 2. Originally, it was meant to describe only data held and used at AEFA, primarily in the investment instructions database. The references to billing and remittance info, 16 & 18, were to show that they were part of the overall investment instructions set of data. If we are now going to use the diagram in a different way, I think it needs a few modifications.

Second, I don't know how picky I should be. That is, what are the chances that this patent will wind up as evidence in a patent infringement lawsuit? If there is any reasonable chance of that, and if any of the language or diagrams used in the patent application are not up to the level where they could be successfully defended, then I am even more uncomfortable with signing off on it considering that I might have missed something due to my inexperience with patent language or expectations.

Here are my notes:

1) When I look at Figure 2, I see #22, Investment Instructions, as the CATS arrangement database and the part of Vantage that performs a similar function, and I see #26, Investment Account, as our product accounting systems (further detailed by #s 42, 44, and 46). If my view is accurate, then there are several places in the document that incorrectly refer to #26 as the 'investment account arrangement database'. The term 'arrangement' should only be used in the context of #22, and references to #26 should only be made when

describing the actual client account investments. In fact, the term 'investment instructions' can pretty much replace the term 'arrangement' throughout the document, if so desired. In addition, we may need to re-draw the diagram to remove this 'extra' component ( #26). Some of the following comments will be related to this observation.

2) On page 7, refer to the last full sentence, 'and/or to the investment account arrangement database 26 to purchase investment products (step 220)..' Shouldn't this say 'and/or to the Investment Broker System 20' instead?

3) On page 11, in the center paragraph, the second and third sentences, where it is describing Investment System 20. To me, Investment Broker System 20 is basically everything here at AEFA except for Marketing 48, including the product accounting systems. However, the first sentence just mentions CATS and Vantage. Since the third sentence more accurately describes all of the different components, could the second sentence be deleted? And last but not least, there really is no investment account database, only several different product accounting system databases.

4) On page 12, the center paragraph doesn't make sense to me given the last sentence of comment number 3 above.

5) On page 12, the last paragraph that continues into page 13 does not make sense to me. The diagram originally was meant to show that the investment instructions database 22 could be used to pull off data for marketing 32, trade instructions within an IMA account (30), and product information (34). There may very well be separate marketing and product information databases, but if there is such a thing as a trade information database 30, it would be the brokerage accounting system itself.

6) On page 15, in the top paragraph, beginning with 'wherein the number in the tenth...', since the only billing frequency available to a client is monthly, the 10th digit only tells us which of the monthly cycles to use. It does not communicate any other billing frequency.

7) On page 15, bottom paragraph, and continuing into the next (middle) paragraph on page 16, it seems to get a little repetitious while describing figure 4. At that point we have already transmitted a file of billing records

to the card system and the card system has already printed the bill (first paragraph on page 15). To me, the key point of figure 4 is that at the same time that we send a billing file to the card system, we also send them an extract file to satisfy the 'Chicago Remittance' requirement, whereby all remittance envelopes for card members participating in this offering have a Chicago return address. This card function is performed in the 'TRS Billing Consolidator Process', also shown on figure 1. Maybe we could dispense with figure 4 altogether and include the Chicago Remittance description with the prior paragraph, or not at all.

8) On page 20, last paragraph, second sentence. I believe this should refer to the investment instructions database 22 instead of investment account 26. The 3rd sentence is accurate, but the 4th and 5th sentences, plus all of pages 21 and 22 seem to give more detail about sentence numbers 2 and 3.

This

should be re-worded/re-ordered to be more clear (and the last sentence is misleading and can be deleted since it is covered elsewhere). Part of the problem might be that diagrams 5 and 6 overlap a little. For example, #518 = #602, etc. It would be more clear if these 2 diagrams could be combined to show the entire remittance process.

9) For the bulk of pages 20 through 24, where references are made to the diagrams, I believe they should be re-worded after we decide how to address my concerns with the diagrams. There are many misleading references to the investment account database 26 that need to be adjusted, as well as some references to the investment broker system 20.

10) On page 27, near the bottom, the broker system components needs re-wording per my prior comments.

11) On page 28, under #6, the description of an 'arrangement' database needs adjusting (I'm assuming that we would prefer to use the term 'investment instructions' rather than 'arrangement').

12) On page 30, first sentence, clarify what is included in the investment broker system. Also, the last sentence should probably refer to the investment broker system rather than the investment account arrangement database.

CC: "Suzanne Crane" <Suzanne.Crane@aexp.com>

10655.7706

From: Howard Sobelman  
To: I-Mail.SMTP("Suzanne.Crane@aexp.com")  
Date: 10/8/99 8:18am  
Subject: Re: IOTC revised patent application -Reply

please let me know when i have received all of the comments (i do not know how many people are reviewing the document).....i cannot finalize the declarations, etc. until i fully edit the document because after the declarations are signed, we cannot make any more changes.....thx

\*\*\*\*\*

Howard I. Sobelman, Esq.  
SNELL & WILMER L.L.P.  
One Arizona Center  
400 E. Van Buren  
Phoenix, AZ 85004-0001  
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>>> "Suzanne Crane" <Suzanne.Crane@aexp.com> 10/08/99 08:10am >>>  
I'm still awaiting two addresses, I'll send the asap when I get them all. I instructed people to send comments directly to you Howard via Notes and copy me to save time. I reminded them this morning to do this TODAY!! And to confirm if they had no comments, which I expect from two of the people.

Rockell, Howard has my comments so you can give it a read now if you feel. I can't tell how much comments the other people are going to have. They had a lot the first time, but Howard did a great job adjusting for them.

CC: I-Mail.SMTP("Rockell.Metcalf@aexp.com"),

# **EXHIBIT HH**

**From:** "Rockell Metcalf" <Rockell.Metcalf@aexp.com>  
**To:** "SOBELMH@swlaw.com" <SOBELMH@swlaw.com>  
**Date:** 10/12/99 11:14am  
**Subject:** Re: IOTC -Reply

7700

I now have comments from the Card lawyer. Please call. (212)640-5760.  
Thanks.

**CC:** "dmier@swlaw.com" <dmier@swlaw.com>, "Suzanne Cran...



**From:** Howard Sobelman  
**To:** PHXDOM.PHX34(MIERD), I-Mail.SMTP("Rockell.Metcalf@...  
**Date:** 10/12/99 8:27am  
**Subject:** Re: IOTC -Reply

if you have any changes, please let me know asap.....Suzanne has all of the legal documents which cannot be signed until all changes are input into the document.....thx

>>> "Rockell Metcalf" <Rockell.Metcalf@aexp.com> 10/12/99 06:38am >>>  
Thanks, Howard. I'll call you today to discuss some final legal comments. I'm going to get final comments from the Card lawyer today. I don't expect them to be extensive.

**From:** dmier%swlaw.com@Internet on 10/11/99 05:45 PM MST  
**To:** Rockell Metcalf@AMEX, Suzanne Crane@MailHub1  
**cc:** sobelmh%swlaw.com@Internet  
**Subject:** IOTC

Attached to this email is the revised patent application which incorporates Mark Sweazy's comments. I am faxing the required documents for you to sign and a revised Figure 2.

The only figure change is Figure 2 wherein the billing info 16 reports directly to investment instructions 22. Also, original 26 and 40 is deleted and investment account is now 40. Most of the changes to the text reflect the changes to Figure 2....

\*\*\*\*\*

Deborah A. Mier  
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**CC:** I-Mail.SMTP("Suzanne.Crane@aexp.com"),

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